

**STEPTOE & JOHNSON LLP**  
STEPHANIE A. SHERIDAN, State Bar No. 135910  
ssheridan@steptoe.com  
ANTHONY J. ANSCOMBE, State Bar No. 135883  
aanscombe@steptoe.com  
MEEGAN B. BROOKS, State Bar No. 298570  
mbrooks@steptoe.com  
Steuart Tower, 1 Market Street, Suite 1800  
San Francisco, CA 94105  
Telephone: (415) 365-6700  
Facsimile: (415) 365-6678

Attorneys for Defendant,  
RODAN & FIELDS, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

BARBARA LEWIS, AKEMI  
BUCKINGHAM, BOBBIE JOE HULING,  
CYNTHIA WHETSELL, MARTHA MERLE,  
ELAINA HUFNAGEL, TERESA GATTUSO,  
ELISSA WAGNER, and DIXIE WILLIAMS,  
individually and on behalf of all others  
similarly situated,

## Plaintiffs.

VS.

RODAN & FIELDS, LLC, a California limited liability,

Defendant.

Case No. 4:18-cv-02248-PJH  
(Consol. with No. 4:18-cv-02505-PJH)

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS  
PLAINTIFFS' CONSOLIDATED  
COMPLAINT**

Assigned To: Judge Phyllis J. Hamilton

Hearing Date: February 20, 2019  
Hearing Time: 9:00 a.m.  
Courtroom: 3 – 3rd Floor

Action Filed: April 13, 2018

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2	172 P.3d 701 (2007) .....	
3	<i>Rubenstein v. The Gap, Inc.</i> ,	14
4	14 Cal. App. 5th 870, 876–77 (2017).....	
5	<i>Scripps Clinic v. Superior Court</i> ,	17
6	108 Cal. App. 4th 917 (2003).....	
7	<i>State Farm Fire &amp; Cas. v. Super. Court</i> ,	17
8	45 Cal. App. 4th 1093 (1996).....	
9	<i>Vega v. Jones, Day, Reavis &amp; Pogue</i> ,	19
10	121 Cal. App. 4th 282 (2004).....	
11	<i>Wells Fargo Bank v. FSI, Financial Solutions, Inc.</i> ,	18
12	196 Cal. App. 4th 1559 (2011).....	
13	<b>Other State Cases</b>	
14	<i>Alejandro v. Bull</i> ,	29
15	159 Wash. 2d 674 (2007) .....	
16	<i>Arlington Pebble Creek, LLC v. Campus Edge Condo. Assn.</i> ,	27
17	232 So. 3d 502 (Fla. 1st Dist. App. 2017), <i>reh'g denied</i> (Jan. 9, 2018), <i>review denied</i> , SC18-237, 2018 WL 3301498 (Fla. July 5, 2018) .....	
18	<i>Atkinson v. Rosenthal</i> ,	23
19	598 N.E.2d 666 (Mass. App. Ct. 1992).....	
20	<i>Austin v. Ettl</i> ,	28
21	286 P.3d 85 (Wash. App. Ct. 2012) .....	
22	<i>Avery v. State Farm Mut. Auto. Ins.</i> ,	21
23	835 N.E.2d 801 (Ill. 2005) .....	
24	<i>Bannister v. Agard</i> ,	27
25	5 N.Y.S.D.3d 114, 115 (2d Dep't 2015) .....	
26	<i>Barbara's Sales, Inc. v. Intel Corp.</i> ,	22
27	879 N.E.2d 910 (Ill. 2007) .....	
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3	<i>Carlile v. Harbour Homes, Inc.</i> , 194 P.3d 280 (Wash. App. Ct. 2008) .....	27
5	<i>Cumis Ins. Soc'y. v. BJ's Wholesale Club, Inc.</i> , 918 N.E.2d 36 (Mass. 2009) .....	28
6	<i>Doe v. Dilling</i> , 888 N.E.2d 24 (Ill. 2008) .....	27
8	<i>Don Slack Ins. v. Fidelity &amp; Cas.</i> , 385 So. 2d 1061 (Fla. Dist. Ct. App. 1980).....	28
10	<i>First Midwest Bank v. Stewart Title Guar</i> , 843 N.E.2d 327 (Ill. 2006) .....	29
11	<i>Fox Associates, Inc. v. Robert Half Int'l</i> , 777 N.E.2d 603 (Ill. App. Ct. 2002).....	29
13	<i>Gale v. Int'l Bus. Machines Corp.</i> , 781 N.Y.S.2d 45 (2nd Dep't 2004) .....	25
15	<i>Gilchrist Timber Co. v. ITT Rayonier, Inc.</i> , 696 So. 2d 334 (Fla. 1997).....	28
16	<i>Goshen v. Mutual Life Insurance Company of New York</i> , 774 N.E.2d 1190 (N.Y. App. Ct. 2002) .....	25
18	<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.</i> , 105 Wash.2d 778, 719 P.2d 531 (1986).....	26
20	<i>Holiday Resort Cnty. v. Echo Lake Assocs.</i> , 135 P.3d 499 (Wash. Sup. Ct. 2006).....	26
21	<i>Hollywood Trucking, Inc. v. Watters</i> , 895 N.E.2d 3 (Ill. App. Ct. 2008).....	28
23	<i>Huffstetler v. Our Home Life Ins.</i> , 65 So. 1 (Fla. 1914).....	27
25	<i>Jackson v. Esurance Ins.</i> , 412 P.3d 299 (Wash. App. Div. 2017).....	26
26	<i>Levings v. Forbes &amp; Wallace, Inc.</i> , 396 N.E.2d 149 (Mass. App. Ct. 1979).....	23
28		

1	<i>Macias v. HBC of Fla., Inc.</i> , 694 So.2d 88 (Fla. 3d DCA 1997) .....	20
2		
3	<i>Mulligan v. QVC, Inc.</i> , 888 N.E.2d 1190 (Ill. 2008) .....	21
4		
5	<i>Oliveira v. Amoco Oil Co.</i> , 776 N.E.2d 151 (Ill. 2002) .....	21
6		
7	<i>Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.</i> , 647 N.E.2d 741 (N.Y. App. Ct. 1995) .....	24
8		
9	<i>PMP Assocs. v. Globe Newspaper Co.</i> , 321 N.E.2d 915 (Mass. 1975) .....	23
10		
11	<i>Porras v. StubHub, Inc.</i> , No. C12-12252012 .....	15
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13	<i>Robinson v. Toyota Motor Credit Corp.</i> , 775 N.E.2d 951 (Ill. 2002) .....	22
14		
15	<i>Rollins, Inc. v. Butland</i> , 951 So. 2d 860 (Fla. 2d DCA 2006), <i>review denied</i> , 962 So. 2d 335 (Fla. 2007) .....	19, 20
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17	<i>Sing v. John L. Scott, Inc.</i> , 948 P.2d 816 (Wash. Sup. Ct. 1997) .....	26
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19	<i>Small v. Lorillard Tobacco Co.</i> , 720 N.E.2d 892 (NY App. Ct. 1999) .....	24, 25
20		
21	<i>Stutman v. Chem. Bank</i> , 731 N.E.2d 608 (N.Y. App. Ct. 2000) .....	24
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23	<i>Trimble v. Washington State Univ.</i> , 993 P.2d 259 (Wash. 2000) .....	28
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25	<i>Vess v. Ciba-Geigy Corp.</i> , 317 F.3d 1097 (9th Cir. 2003) .....	10
26		
27	<b>Federal Statutes</b>	
28		
29	18 U.S.C.	
30	§ 1961 .....	33
31	§ 1962(c) .....	32
32	§ 1964(c) .....	29
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34	U.S. Code	
35	§ 362 .....	12
36		

1	<b>California Statutes</b>	
2	Cal. Bus. & Prof. Code	
3	§§ 17204, 17535 .....	13
3	§ 17500 .....	16
4	<b>Other State Statutes</b>	
5	815 ILCS 505/10a .....	21, 22
6	Fla. Stat.	
7	§ 501.211 .....	20
8	Mass. Gen. Laws Ann. Chapter 93A	
9	§§ 2(a), 9(a) .....	22
10	N.Y. Gen. Bus. Law	
11	§§ 349 and 350 .....	25
12	RCW 19.86.090 .....	26
13	<b>Other Authorities</b>	
14	CACI Nos. 1901, 1903 .....	14, 16, 19
15	Fed. R. Civ. P. 8 and 9(b) .....	1
16	Fed. R. Civ. P. 9 .....	10
17	FRCP 23(c)(4) .....	5
18	<u><a href="http://www.oprah.com/fashion_and_beauty/does-mascara-irritate-your-eyes-heres-why">http://www.oprah.com/fashion_and_beauty/does-mascara-irritate-your-eyes-heres-why</a></u> .....	16
19	<u><a href="https://www.instyle.com/beauty/eyes/best-mascaras-sensitive-eyes">https://www.instyle.com/beauty/eyes/best-mascaras-sensitive-eyes</a></u> .....	16
20	<u><a href="https://www.rodanandfields.com/shop/product/enhlsh01#usage">https://www.rodanandfields.com/shop/product/enhlsh01#usage</a></u> .....	4
21	Restatement (Second) of Torts § 552(1) .....	28
22	United States Constitution Article III, § 2 .....	7
23	United States Constitution Article III .....	1, 7, 8, 15
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1 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE:** On February 20, 2018 at 9:00 a.m., or as soon thereafter as  
 3 the matter may be heard, in Courtroom 3 of the above-entitled Court, at 1301 Clay Street,  
 4 Oakland, California, Defendant Rodan & Fields, LLC (“R+F”) will and hereby does move for an  
 5 order dismissing in its entirety the Consolidated Complaint (“CC”) of Plaintiffs Barbara Lewis,  
 6 Akemi Buckingham, Bobbie Joe Huling, Cynthia Whetsell, Martha Merle, Elaina Hufnagel,  
 7 Teresa Gattuso, Elissa Wagner, and Dixie Williams (“Plaintiffs”), pursuant to Rules 8(a), 9,  
 8 12(b)(1), 12(b)(6), and 12(g) of the Federal Rules of Civil Procedure.

9 Plaintiffs lack standing to bring this action because they do not allege any injury caused by  
 10 R+F’s alleged failure to disclose side effects of Lash Boost. Plaintiffs also fail to plead sufficient  
 11 facts to state a claim. They do not allege the representations they relied on, or any facts to support  
 12 their claim that R+F acted deceptively; they do not adequately allege that reasonable consumers  
 13 would be deceived by R+F’s actions; and they do not allege any damage.

14 This Motion is based on this Notice of Motion and Motion; the attached Memorandum of  
 15 Points and Authorities in support of the Motion; the Request for Judicial Notice submitted  
 16 herewith; and on all other matters that may be judicially noticed or produced at the hearing of this  
 17 matter.

18 DATED: October 26, 2018

STEPTOE & JOHNSON LLP

19 By: /s/ *Stephanie Sheridan*

20 Stephanie Sheridan  
 21 Anthony J. Anscombe  
 22 Meegan B. Brooks  
 23 Attorney for Defendant  
 24 RODAN & FIELDS, LLC

25

26

27

28

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. STATEMENT OF ISSUES TO BE DECIDED

3 1) Do Plaintiffs have Article III or statutory standing to bring this action, where they do not  
4 allege that Lash Boost failed to meet their expectations, that it was not worth the amount they  
5 paid, or that it caused them any physical injury?

6 2) Have Plaintiffs stated a claim in compliance with Fed. R. Civ. P. 8 and 9(b) where:

7 a) Their fraud-based claims do not allege with particularity the circumstances of the  
8 purported fraud, the statements they viewed and the omissions they relied on, or facts suggesting  
9 that they would have seen additional disclosures?

10 b) Plaintiffs' Unfair Competition Law and False Advertising Law claims fail because  
11 they have not alleged that they lack an adequate remedy at law; and Plaintiffs have not alleged  
12 facts to support a violation of existing statutory law, an unfair act or practice, or deception?

13 c) Plaintiffs' Counts under the consumer protection statutes of California, Florida,  
14 Illinois, Massachusetts, New York, and Washington fail to allege a deceptive act, reliance,  
15 causation, or resulting damage?

16 d) Plaintiffs' claims for fraudulent concealment, fraudulent misrepresentation, and/or  
17 negligent misrepresentation fail because they do not allege facts to support justifiable reliance,  
18 falsity, scienter, an intent to induce reliance or cause deception, or damages?

19 e) Plaintiffs' claims for negligent misrepresentation fail under California, Florida, and  
20 Washington law, which do not permit such claims to be based on omissions; and where the  
21 economic loss rule forecloses claims for negligent misrepresentation under Illinois and  
22 Washington law?

23 g) Plaintiffs' claims under the Racketeer Influence and Corrupt Organization Act  
24 ("RICO") do not allege facts to support statutory standing, the existence of a fraudulent scheme, or  
25 a criminal enterprise?

## II. SUMMARY OF ARGUMENT

27 This Court should dismiss Plaintiffs' action under Rule 12(b)(1) because Plaintiffs lack  
28 standing, and under Rule 12(b)(6) because they have failed to state a claim.

1       The nine Plaintiffs wanted longer-looking, fuller-looking eyelashes, so they purchased  
 2 ENHANCEMENTS Lash Boost (“Lash Boost”), an eyelash-conditioning serum sold by Rodan &  
 3 Fields, LLC (“R+F”) that makes eyelashes appear longer and fuller.<sup>1</sup> Plaintiffs do not claim that  
 4 Lash Boost failed to make their eyelashes appear longer and fuller. Instead, Plaintiffs complain  
 5 that the product can cause serious side effects that R+F did not disclose. They have not alleged a  
 6 plausible scientific basis to support a causal relationship between Lash Boost and these serious  
 7 side effects. Plaintiffs also do not claim to have reviewed the warnings that R+F did provide in  
 8 multiple locations, including on packaging, on the product website, and in promotional materials.

9       This is not a personal injury action. Plaintiffs do not allege that Lash Boost caused them  
 10 to experience serious side effects. Plaintiffs also do not claim that the product had an economic  
 11 value of less than they paid, or that they face a concrete risk of future harm. Rather, this is a  
 12 classic no-injury product liability case. Plaintiffs claim that the marketing of Lash Boost led them  
 13 to expect it would be one thing (a product with no potential for side effects) when in fact it was  
 14 something else (a product with a potential for side effects). Plaintiffs claim that the mere *potential*  
 15 for side effects constitutes an *actual* injury.

16       The Consolidated Complaint (CC) purports to bring twenty causes of action under the laws  
 17 of six states and RICO, but each claim fails for similar reasons. Plaintiffs fail to plead their fraud-  
 18 based claims in conformity with Rule 9(b). The CC lacks required factual details, including the  
 19 dates of Plaintiffs’ purchases and key information about the representations and omissions that  
 20 allegedly caused them to buy Lash Boost. Plaintiffs do not allege scientific facts to show that  
 21 Lash Boost actually causes serious side effects, or that R+F knew of such side effects. Plaintiffs  
 22 also fail to plead any RICO claim as they have not pled facts showing the commission of predicate  
 23 acts or existence of a criminal enterprise. To the contrary, Plaintiffs’ own allegations concede that

---

24       <sup>1</sup> The nine Plaintiffs reside in and purport to bring claims under the laws of the following states:  
 25       • California: Barbara Lewis and Akemi Buckingham  
 26       • Florida: Bobbie Joe Huling  
 27       • Illinois: Cynthia Whetsell  
 28       • Massachusetts: Martha Merle  
 29       • New York: Elaina Hufnagel, Teresa Gattuso, and Elissa Wagner  
 30       • Washington: Dixie Williams

1 a criminal enterprise did not exist.

### 2 **III. BACKGROUND AND SUMMARY OF ALLEGED FACTS**

#### 3 **A. Lash Boost Is Different From Other Eyelash Serums**

4 This case involves an eyelash conditioning serum, Lash Boost, which enhances the  
 5 appearance of eyelashes. Lash Boost's labeling and promotional communications send a  
 6 consistent message: Lash Boost is intended to *beautify* eyelashes—to change their appearance.  
 7 *See, e.g.*, CC ¶ 2 (“enhance the *appearance* of eyelash volume and length”); *id.* ¶ 122 (“get the  
 8 *appearance* of . . . longer-*looking* lashes”).

9 Lash Boost's marketing stands in contrast to that of Latisse®, a prescription drug  
 10 mentioned 34 times in the CC, which explicitly claims to increase the size and thickness of  
 11 eyelashes. CC ¶¶ 6–7, 83, 86–87, 94–98, 215, 288. Latisse contains bimatoprost, an active  
 12 ingredient specifically marketed as promoting eyelash growth. CC ¶¶ 94–98. Lash Boost does not  
 13 contain bimatoprost. Lash Boost contains many ingredients, but Plaintiffs here have focused on  
 14 one: isopropyl cloprostenate (“IC”). IC is not bimatoprost. The European Union's Cosmetic  
 15 Ingredient Database (CosIng) classifies IC as a “cosmetic ingredient” for use as a “hair  
 16 conditioning agent.” *See* RJN, Exhibit A. Plaintiffs do not allege a plausible scientific basis to  
 17 suggest that all “prostaglandin analogs” (a term used to describe a broad class of compounds  
 18 which includes bimatoprost and IC) have the same, or even similar, effects on the body. Plaintiffs  
 19 acknowledge that “prostaglandins and their analogs, including Isopropyl Cloprostenate . . . are not  
 20 banned from cosmetics in the United States.” *Id.* ¶ 8. Plaintiffs also do not contend that Lash  
 21 Boost is a drug, and do not challenge the legality of using IC as an ingredient. *Id.* ¶ 16 n.19 (“This  
 22 action does not allege that Lash Boost is subject to FDA regulation or should have been regulated  
 23 by the FDA.”).

24 Like most cosmetics, Lash Boost may cause irritation for some users, especially when not  
 25 used as directed. R+F's website and the Lash Boost packaging currently warn:

26 **WARNINGS:** [¶] For external use only. Avoid getting in the eye; in the event of  
 27 direct contact rinse with cool water. ***If you develop irritation or swelling,  
 28 discontinue product usage. If irritation is significant or in the first instance of  
 any swelling, consult your physician.*** If you're pregnant or nursing, being treated  
 for any eye-related disorder, undergoing cancer treatment, prone to dry eyes or

1           styes, consult your physician before use. If you notice irregularities in appearance  
 2           of lashes, discontinue use. Keep out of reach of children.  
 3

4       See CC ¶ 107 (emphasis added); <https://www.rodanandfields.com/shop/product/enhlsh01#usage>  
 5       Notes. Previous warnings stated: “For external use only. Avoid getting in the eye; in the event of  
 6       direct contact, rinse with cool water. If irritation persists, consult your physician. Consult with  
 7       your physician if you’re pregnant or nursing, being treated for any eye-related disorder or actively  
 8       undergoing cancer treatment. Keep out of reach of children.” CC ¶ 106.  
 9

10      R+F also provides detailed use instructions on the Lash Boost product page and on product  
 11     packaging, which warn users of potential irritation, and to stop use if irritation occurs:  
 12

13       For some, a mild tingling sensation may occur upon application. It should improve  
 14       within a few minutes and disappear completely with continuous use. ***Discontinue  
 15       use if tingling, irritation, and/or redness persists.***  
 16

17      CC ¶ 100, emphasis added. The Lash Boost website contains additional warnings. *See, e.g., id.*  
 18      ¶ 133 (“[I]f you do experience some adverse effects, please discontinue use and seek medical  
 19     advice.”); ¶ 131 (“[I]f anyone has a health concern or is hesitant about using [Lash Boost], they  
 20     may review the ingredient list with their doctor and utilize the patch test prior to use”); ¶ 125 n.55  
 21     (the cited link states, “some consumers may report temporary tingling or redness . . . if any  
 22     tingling, itching or redness persists or is not tolerable, discontinue use and seek medical advice.”)  
 23     (emphasis in original).  
 24

25      B.     Plaintiffs’ Purchases and Liability Allegations

26      Plaintiffs claim to have purchased Lash Boost, and uniformly allege that they did not know  
 27     that it could cause: “change in iris color, eyelid drooping, itchy eyes, eye discoloration, thinning  
 28     eyelashes/loss of eyelash hair, eye sensitivity, eye infections, cysts, and vision impairment.” *See,*  
 29     *e.g.*, CC ¶¶ 120, 123–32. Plaintiffs each claim that at some time “after” or “following” their use of  
 30     Lash Boost, they experienced some form of eye irritation. CC ¶¶ 25–26, 31, 38–39, 45, 52, 58, 62,  
 31     66, 70. Plaintiffs do not actually allege that Lash Boost caused their eye irritation. Instead, they  
 32     claim that they would not have purchased it if they had known that Lash Boost *could* cause the  
 33     allegedly serious side effects. *Id.* ¶¶ 23, 30, 37, 44, 51, 57, 61, 65, 69, 116.  
 34

35      Plaintiffs do not claim to have read any of R+F’s warnings, but acknowledge that Lash  
 36

1 Boost's advertising, website, and packaging *do* warn of irritation. CC ¶¶ 100, 102, 106–07.  
 2 Notwithstanding the presence of warnings about "significant irritation," "swelling," and  
 3 "irregularities in appearance of lashes," Plaintiffs contend that consumers would "reasonably  
 4 conclude that the product was safe and non-irritating." *Id.* ¶¶ 107, 113.

5 Plaintiffs claim that R+F and its "independent sales consultants" formed a criminal  
 6 enterprise with the common purpose of selling Lash Boost "without fully disclosing its adverse  
 7 side effects to consumers." CC ¶¶ 383–84, 389. The CC notes that R+F's consultants are  
 8 independent contractors who help market and sell R+F's products, but points to nothing sinister  
 9 about the relationship between R+F and the consultants. *Id.* ¶ 74. Nonetheless, the CC claims  
 10 R+F and its consultants engaged in mail and wire fraud through the use of online advertisements  
 11 for Lash Boost, and the shipments of the Lash Boost tubes. *Id.* ¶¶ 416–22. Plaintiffs further  
 12 allege that R+F perpetrated this scheme through a criminal enterprise formed with its consultants.  
 13 *Id.* ¶ 395. Specifically, Plaintiffs claim that, by promoting Lash Boost using R+F-designed or  
 14 approved marketing materials, R+F's consultants became "unwitting co-conspirators" in this  
 15 alleged fraudulent scheme. *Id.* Plaintiffs claim that this fraud caused "economic damages in that  
 16 they did not receive what they paid for when purchasing Lash Boost," and that R+F "wrongfully  
 17 deprived [them] of their money." *Id.* ¶ 430.

18 Each Plaintiff purport to bring claims on behalf of a subclass of Lash Boost purchasers in  
 19 their home state—California, Florida, Illinois, Massachusetts, New York, and Washington. They  
 20 assert claims under each state's consumer protection laws, and for common law fraud (fraudulent  
 21 concealment, fraudulent misrepresentation, and/or negligent misrepresentation). Plaintiffs also  
 22 purport to bring claims on behalf of a nationwide class pursuant to RICO. In the alternative to the  
 23 nationwide class, Plaintiffs seek to represent a nationwide "issue class" pursuant to FRCP 23(c)(4)  
 24 to resolve "whether the label is misleading and whether the warnings were inadequate." *Id.* ¶ 156.

25 **C. What Is Not In the Consolidated Complaint**

26 Plaintiffs allege that they "relied on Rodan + Fields' omissions," CC ¶ 121, but do not  
 27 identify any *affirmative representation* by R+F that they saw or relied on. In fact, Plaintiffs  
 28 appear to disavow reliance on affirmative statements. *Id.* ("While Plaintiffs relied on Rodan +

1 Fields' omissions, Rodan + Fields also issued affirmative misrepresentations about Lash Boost.  
 2 These misrepresentations are discussed because they help to show Rodan + Fields' state of mind,  
 3 among other issues."). Given that Plaintiffs did not read the warnings and other information that  
 4 R+F actually provided, they have not alleged facts to support an inference that they would have  
 5 seen the additional warnings that they contend R+F should have given.

6 As to side effects other than irritation, Plaintiffs have not alleged facts to support an  
 7 inference that Lash Boost causes those side effects. Plaintiffs cite documents pertaining to the side  
 8 effects of Latisse, but they say nothing as to Lash Boost or IC. The only allegations in the CC  
 9 relating to IC come from a warning letter issued seven years ago by the FDA to a manufacturer of  
 10 different lash products. CC ¶¶ 5, 11, 83, 111 (discussing Lifetech Warning Letter (Apr. 18,  
 11 2011).) Plaintiffs' representation that the FDA made findings about IC (see, e.g., CC ¶ 5, 11) in  
 12 this prior warning letter to a different company is misleading. The FDA's letter does not state that  
 13 IC or the products at issue there actually cause side effects, much less the specific ones these  
 14 Plaintiffs claim to be worried about. Rather, that letter only states there may be "potential adverse  
 15 events associated with prostaglandin analogs for ophthalmic use." FDA's statements are neither  
 16 scientific findings nor formal agency actions with any binding legal effect.<sup>2</sup> As shown in public  
 17 filings, Lifetech, the recipient of the warning letter, responded to the FDA, agreeing to change its  
 18 marketing claims, but not its product formulation. RJD, Exh. B. The FDA took no further action.  
 19 Products at issue in the warning letter are still being sold today, with IC still listed as an  
 20 ingredient. RJD, Exh. C.

21 Plaintiffs also quote several purported customer complaints found on the Internet. CC  
 22 ¶ 140. These unidentified customers discuss irritation such as redness and dryness (which R+F  
 23 warned about), but not any of the serious alleged side effects that Plaintiffs claim R+F should have  
 24 disclosed. These complaints do not provide scientific evidence that Lash Boost causes these or  
 25 any other side effects. In sum, the CC does not show that IC or Lash Boost carry actual risks

26 <sup>2</sup> See *Summit Tech., v. High-Line Med. Instruments Co.*, 922 F. Supp. 299, 306 (C.D. Cal. 1996);  
 27 *Cody Labs., v. Sebelius*, 446 F. App'x 964, 969 (10th Cir. 2011); *Holistic Candlers & Consumers  
 Ass'n v. FDA*, 664 F.3d 940, 944-45 (D.C. Cir. 2012); see also *Reliable Automatic Sprinkler Co.  
 v. CPSC*, 324 F.3d 726, 731 (D.C. Cir. 2003).

1 beyond those already disclosed.

2 **IV. THIS COURT LACKS SUBJECT MATTER JURISDICTION AND SHOULD**  
 3 **DISMISS THIS ACTION PURSUANT TO RULE 12(b)(1)**

4 **A. Legal Standard Applicable to a Rule 12(b)(1) Motion**

5 Federal courts may only adjudicate “cases” and “controversies.” U.S. Const. art. III, § 2.  
 6 To establish standing under Article III of the United States Constitution, a plaintiff must plead  
 7 facts to demonstrate three things: (1) that he suffered an injury-in-fact that is “concrete and  
 8 particularized . . . [and] actual or imminent, not conjectural or hypothetical”; (2) the injury is  
 9 fairly traceable to the action of the defendant; and (3) the injury will likely be redressed with a  
 10 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

11 “[N]amed plaintiffs who represent a class must allege and show that they personally have  
 12 been injured, not that injury has been suffered by other, unidentified members of the class to  
 13 which they belong and which they purport to represent.” *In re Ditropan XL*, 529 F. Supp. 2d  
 14 1098, 1107 (N.D. Cal. 2007) (quoting *Lewis v. Casey*, 518 U.S. 343, 347 (1996)). Plaintiffs bear  
 15 the burden of establishing standing, and if they fail to do so, dismissal is mandatory under Fed. R.  
 16 Civ. P. 12(b)(1). See *Lujan*, 504 U.S. at 561; *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d  
 17 1136, 1139 (9th Cir. 2003).

18 **B. Plaintiffs Do Not Allege an Actual, Presently Existing, Concrete Injury**

19 Plaintiffs have not pled facts to demonstrate that they have sustained an injury in fact.  
 20 Their claims derive entirely from an Article III non-sequitur: R+F failed to provide warnings  
 21 about side effects that they never experienced. This Court should reject Plaintiffs’ attempt to  
 22 “recast no-injury products-liability claims (which are not cognizable) as consumer fraud claims.”  
 23 *Lassen v. Nissan*, 211 F.Supp.3d 1267, 1281 (C.D. Cal. 2016).

24 Plaintiffs assert that Lash Boost presents a Class C pregnancy risk, but that risk has caused  
 25 Plaintiffs no harm. CC ¶ 22, 85, 111. None of Plaintiffs was pregnant or breastfeeding, nor do  
 26 they claim that they trying to become pregnant. *Id.* ¶¶ 20, 27, 34, 41, 48, 53, 59, 63, 67.  
 27 Moreover, Plaintiffs concede that Lash Boost’s previous and current label advises consumers not  
 28 to use Lash Boost while pregnant or nursing. *Id.* ¶¶ 106–07.

1 Courts have consistently dismissed claims where the plaintiff has not suffered harm from a  
 2 product, but merely claims that she would not have purchased a product based on its potential to  
 3 cause injury. *See, e.g., Birdsong v. Apple, Inc.*, 590 F.3d 955, 958–60 (9th Cir. 2009) (Plaintiff  
 4 could not establish standing as to alleged risk of hearing loss caused by iPods, where he did not  
 5 claim to have suffered hearing loss).<sup>3</sup> The Third Circuit recently reiterated “what might heretofore  
 6 have been obvious”: “a plaintiff does not have Article III standing when she pleads economic  
 7 injury from the purchase of a product, but fails to allege that the purchase provided her with an  
 8 economic benefit worth less than the economic benefit for which she bargained.” *In re Johnson &*  
 9 *Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 290 (3d Cir.  
 10 2018); *see also id.* at 281 (“buyer’s remorse, without more, is not a cognizable injury”).

11       C.     Plaintiffs Do Not Allege Facts to Demonstrate the Existence of an Injury  
 12                   Fairly Traceable to R+F

13       Even if Plaintiffs had plausibly alleged that Lash Boost caused their irritation, that  
 14 allegation still would not establish standing because they base their claims on economic injuries,  
 15 not physical injuries. *See Azoulai v. BMW*, 16-CV-00589-BLF, 2017 WL 1354781 \*4 (N.D. Cal.  
 16 Apr. 13, 2017) (despite allegations of physical injuries, “Plaintiffs claim only contract damages  
 17 and consumer fraud[, so] the Court must evaluate whether Plaintiffs have alleged facts showing  
 18 injury in fact derived from those theories.”). Plaintiffs’ only alleged injury here is that had they  
 19 “been aware of these possible side effects before purchasing Lash Boost, [they] would not have  
 20 purchased or used the product.” *See, e.g.*, CC ¶ 23. Plaintiffs lack Article III standing because  
 21 they have not identified an “injury” fairly traceable to R + F.

22       The CC does not identify any representations or omissions that induced reliance, causing  
 23 Plaintiffs’ injuries. ***Plaintiffs do not claim to have actually read the Lash Boost warnings,***  
***labeling or advertising.*** Nor do they claim to have visited R+F’s website or social media, read its

25  
 26       <sup>3</sup> *See also, e.g. O’Neil v. Simplicity, Inc.*, 574 F.3d 501(8th Cir. 2009); *Shields v. Alere Home*  
 27 *Monitoring, Inc.*, No. C15-2580, 2015 WL 7272672 \*9 (N.D. Cal. Nov. 18, 2015); *Whitson v.*  
 28 *Bumbo*, No. C07-05597, 2009 WL 1515597 \*4–5 (N.D. Cal. Apr. 16, 2009); *Rivera v. Wyeth-*  
*Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002); *Williams v. Purdue Pharma.*, 297 F. Supp. 2d 171  
 (D.D.C. 2003).

1 marketing, or read or listened to representations from R+F consultants. They have not identified  
 2 where or how R+F should have given better or additional warnings, and have pled no facts to  
 3 suggest that they would have seen or heard such warnings. Plaintiffs' claim that they were "not  
 4 aware that Lash Boost could have . . . side effects," CC ¶ 21, does not demonstrate the existence of  
 5 an injury causally linked to R+F's alleged conduct. *Lujan*, 504 U.S. at 560–61 ("the injury has to  
 6 be fairly trace[able] to the challenged action of the defendant."); *Mirkin v. Wasserman*, 5 Cal. 4th  
 7 1082, 1093 (1993) (causation for omissions-based claims requires allegation that "had the omitted  
 8 information been disclosed, [they] would have been aware of it and behaved differently").

9 Courts routinely deny plaintiffs standing where they purport to base claims on statements  
 10 or omissions on which they did not rely. *See, e.g., Haskins v. Symantec Corp.*, 654 F. App'x 338,  
 11 339 (9th Cir. 2016) (affirming dismissal of UCL and CLRA claims where plaintiff "did not allege  
 12 that she read and relied on a specific misrepresentation by Symantec"); *Laster v. T-Mobile*  
 13 *USA*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005), *aff'd* 252 F. App'x. 777 (9th Cir. 2007)  
 14 ("While Plaintiffs meticulously describe the allegedly misleading advertisements . . . none of the  
 15 named Plaintiffs allege that they saw, read, or in any way relied on the advertisements; nor do they  
 16 allege that they entered into the transaction *as a result* of [them].").<sup>4</sup>

## 17 V. THE CONSOLIDATED COMPLAINT FAILS TO STATE A CLAIM

### 18 A. Legal Standard

19 To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual  
 20 matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,  
 21 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
 22 Facial plausibility exists when the plaintiff pleads factual content that allows the court to draw the  
 23 reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678  
 24 (citing *Twombly*, 550 U.S. at 556). "[A] plaintiff's obligation to provide the 'grounds' of his

25  
 26 <sup>4</sup> *See also Ehrlich v. BMW*, 801 F. Supp. 2d 908, 919–20 (C.D. Cal. 2010); *McVicar v. Goodman Global*, No. SACV 13-1223-DOC, 2014 WL 794585, \*6 (C.D. Cal. Feb. 25, 2014);  
 27 *Withers v. eHarmony, Inc.*, No. CV 09-2266-GHK RCX, 2011 WL 8156007 \*3 (C.D. Cal. Mar. 4,  
 2011); *In re Facebook Advertising Litig.*, No. 5:09-cv-03043, 2010 WL 3341062\*10 (N.D. Cal.  
 28 Aug. 25, 2010)

1 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the  
 2 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Thus, “a complaint that  
 3 merely ‘tenders naked assertions devoid of further factual enhancement’ fails to” survive a motion  
 4 to dismiss. *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011) (quoting *Iqbal*, 556 U.S. at 678).

5 Additionally, under Rule 9(b), claims sounding in fraud must allege “the who, what, when,  
 6 where, and how’ of the misconduct charged.” *Kearns*, 567 F.3d at 1124 (citing *Vess v. Ciba-*  
 7 *Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003)). Plaintiffs must plead facts to “demonstrate the  
 8 falseness of the charged statements.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549–53 (9th  
 9 Cir. 1994), superseded by statute on other grounds as stated in *SEC v. Todd*, 642 F.3d 1207 (9th  
 10 Cir. 2011); see also *In re iPhone 4s Consumer Litig.*, 637 F. App’x 414, 415 (9th Cir. 2016);  
 11 *Sperling v. DSWC, Inc.*, 699 F. App’x. 654, 655 (9th Cir. 2017). Rule 9(b)’s requirements serve  
 12 “to deter [plaintiffs] the filing of complaints as a pretext for the discovery of unknown wrongs”  
 13 and “to ‘prohibit plaintiffs from unilaterally imposing upon the court, the parties and society  
 14 enormous social and economic costs absent some factual basis.’ ” *Bly-Magee v. California*, 236  
 15 F.3d 1014, 1018 (9th Cir. 2001).

16 That Plaintiffs have asserted omissions-based claims does not relieve them of their  
 17 obligation to satisfy Rule 9(b). See *Kearns*, 567 F.3d at 1126–27; *Sanders v. Apple Inc.*, 672 F.  
 18 Supp. 2d 978, 986 (N.D. Cal. 2009). “[P]laintiff[s] must describe the content of the omission and  
 19 where the omitted information should or could have been revealed, as well as provide  
 20 representative samples of advertisements, offers, or other representations that plaintiff relied on to  
 21 make her purchase and that failed to include the allegedly omitted information.” *Eisen v. Porsche*  
 22 *Cars North Am.*, No. CV 11-9405, 2012 WL 841019 \*3 (C.D. Cal. Feb. 22, 2012) (citing *Marolda*  
 23 *v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009)); see also *Erickson v. Boston*  
 24 *Scientific Corp.*, 846 F. Supp. 2d 1085, 1092 (C.D. Cal. 2011).

25 Rule 9(b) applies to eighteen of the CC’s twenty Counts, including their RICO claims.<sup>5</sup>  
 26

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27 <sup>5</sup> See, e.g., *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (UCL, CLRA);  
 28 *Kelley v. Rambus, Inc.*, 384 F. App’x. 570, 573 (9th Cir. 2010) (CA negligent misrepresentation);  
*Suckow Borax Mines Consol. v. Borax Consol.*, 185 F.2d 196, 209 (9th Cir. 1951) (CA fraudulent

1 For the two exceptions—Count 11 (Illinois negligent misrepresentation) and Count 15 (New York  
 2 GBL)—Plaintiffs fail to state claims in conformity with Rule 8.

3 **B. The Complaint Does Not Satisfy Rule 9(b)'s Standards**

4 **1. Plaintiffs Fail to Allege the Circumstances of their Purchases**

5 Rule 9(b) requires that Plaintiffs allege “the times, dates, places, benefits received, and  
 6 other details of the alleged fraudulent activity.” *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir.  
 7 1993); *Bird v. First Alert, Inc.*, C 14-3585 PJH, 2015 WL 3750225 \*9 (N.D. Cal. June 15, 2015)  
 8 (“the FAC fails to plead facts showing when the transaction occurred (other than ‘the winter of  
 9 2011–2012’), when plaintiff reviewed BRK’s disclosures [], what disclosures she reviewed, and  
 10 why BRK’s disclosures are inadequate . . . .”). Here, Plaintiffs fail to allege basic details of their  
 11 purchases, such as the dates of their purchases, how they purchased Lash Boost (online or through  
 12 a consultant?), or the names of any consultants whose acts, statements or omissions misled them.  
 13 The CC is not “specific enough to give [R+F] notice of the particular misconduct . . . ‘so that [it]  
 14 can defend against the charge and not just deny that they have done anything wrong.’” *Bird*, 2015  
 15 WL 3750225 \*6 (citing *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

16 Plaintiffs have also failed to identify: (1) the content of any representation by R+F that they  
 17 viewed or relied on; (2) where the omitted information should or could have been revealed; or (3)  
 18 any facts to show that Plaintiffs would have seen such representations. These deficiencies provide

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19 concealment); *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002) (FDUTPA);  
 20 *Inman v. Am. Paramount Fin.*, 517 F. App’x. 744, 748 (11th Cir. 2013) (FLA fraudulent and  
 21 negligent misrepresentation); *Haywood v. Massage Envy Fran.*, 887 F.3d 329, 333 (7th Cir. 2018)  
 22 (IFCA); *Roppo v. Travelers Cos.*, 100 F. Supp. 3d 636, 644 (N.D. Ill. 2015), *aff’d sub  
 23 nom. Sabrina Roppo v. Travelers Com. Ins.*, 869 F.3d 568 (7th Cir. 2017) (ILL fraudulent  
 24 concealment and misrepresentation); *Wigod v. Wells Fargo Bank*, 673 F.3d 547, 571 (7th Cir.  
 25 2012) (ILL fraudulent concealment); *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1 (1st Cir. 2017) (93A);  
 26 *N. Am. Catholic Educ. Programming Found., v. Cardinale*, 567 F.3d 8, 15 (1st Cir. 2009) (MA  
 27 fraudulent and negligent misrepresentation); *Musalli Factory for Gold & Jewelry v. JPMorgan  
 28 Chase Bank*, 261 F.R.D. 13, 22 (S.D.N.Y. 2009) (citing *Armstrong v. McAlpin*, 699 F.2d 79, 88  
 (2d Cir. 1983) (NY fraudulent concealment); *Water and Sanitation Health, Inc. v. Rainforest All.*,  
 No. C15-75RAJ, 2015 WL 12657110 \*2 (W.D. Wash. Dec. 29, 2015) (CPA); *Baughn v. Johnson  
 & Johnson*, No. C15-5283 BHS, 2015 WL 4759151 \*3 (W.D. Wash. Aug. 12, 2015) (WA  
 fraudulent concealment); *Wessa v. Watermark Paddlesports, Inc.*, No. C06-5156 FDB, 2006 WL  
 1418906 \*2 (W.D. Wash. May 22, 2006) (WA negligent misrepresentation); *Bitton v. Gencor  
 Nutrientes, Inc.*, 654 F. App’x. 358, 363 (9th Cir. 2016) (RICO).

1 additional bases for dismissal. *See, e.g., Kearns*, 567 F.3d at 1126; *see also Haskins v. Symantec*  
 2 *Corp.*, 654 F. App'x 338, 339 (9th Cir. 2016); *Marolda*, 672 F. Supp. 2d at 1001 (dismissing  
 3 omissions claim under Rule 9(b) where plaintiff “fail[ed] to plead with particularity how and on  
 4 what occasion this representation was made and how it was related to the 2007 purchase.”).

5 **2. Plaintiffs Fail to Allege a Plausible Scientific Basis for Their Claim that**  
 6 **Lash Boost Causes “Serious Side Effects”**

7 Plaintiffs contend that R+F failed to disclose that Lash Boost, and/or IC, causes several  
 8 serious side effects, such as “droopy eyelids” and “reactivate herpes.” CC ¶¶ 60, 80. Plaintiffs  
 9 have not, however, alleged scientific facts to show that Lash Boost actually causes these  
 10 conditions. Absent scientific evidence to show that Lash Boost causes these conditions, R+F  
 11 could have no obligation to provide warnings. *Corral v. Carter's Inc.*, 1:13-CV-0262 AWI SKO,  
 12 2014 WL 197782 \*4 (E.D. Cal. Jan. 16, 2014) (“to establish the ‘Fact’ that the [products] sold by  
 13 Defendant pose the *risk* of infant harm, Plaintiff’s must allege at least some evidence that the use  
 14 of Defendant’s product, as directed, increases the frequency with which the harm will occur.”)  
 15 Indeed, without scientific evidence the Lash Boost actually causes these side effects, the warnings  
 16 sought by Plaintiffs would cause the product to be misbranded. The FDCA does not permit R+F  
 17 to warn of non-existent side effects. *See* 21 U.S. Code § 362 (“A cosmetic shall be deemed to be  
 18 misbranded . . . If its labeling is false or misleading in any particular.”)

19 Plaintiffs’ allegations as to other products, and as to the 2011 FDA warning letter, do not  
 20 satisfy Plaintiffs’ pleading burden, because they fail to show that **Lash Boost** causes these  
 21 conditions. Moreover, their allegation that R+F lacked evidence of safety does not prove the  
 22 opposite—that Lash Boost is unsafe.

23 The Ninth Circuit’s recent decision in *Aloudi v. Intramedic Research Group*, 729 F. App’x.  
 24 514, 516 (9th Cir. 2017) demonstrates how a plaintiff must plead evidentiary facts to support  
 25 medical allegations. The court affirmed dismissal of plaintiff’s claim that defendant falsely  
 26 promoted its product, JavaSLIM, as promoting rapid weight loss. The plaintiff argued that the  
 27 product’s primary weight loss ingredient, chlorogenic acid, is a common ingredient in coffee,  
 28 which does not cause rapid weight loss. The plaintiff also cited a study concerning the effects of

chlorogenic acid. The court found these allegations insufficient to demonstrate the falsity of JavaSLIM's representations: "None of these allegations involves scientific testing of the actual JavaSLIM product or a product with the same active ingredients as JavaSLIM, in a dose similar to that in JavaSLIM." *Id.* Other courts have dismissed claims for similar reasons, where plaintiffs have based their claims on different products, ingredients, or formulations. *See, e.g., Eckler v. Wal-Mart Stores, Inc.*, 12-CV-727-LAB-MDD, 2012 WL 5382218 \*6-7 (S.D. Cal. Nov. 1, 2012) (scientific studies did not lend "facial plausibility" to plaintiff's claims when none of the studies addressed the product at issue; "it's not really arguing the merits to claim . . . that the studies on which [plaintiff] relies didn't even test the actual formulation of [the product at issue]"); *Corral*, 2014 WL 197782 \*4 (granting motion to dismiss where, "In short, no studies cited in Plaintiff's FAC link the use of *Defendant's* product according to the instructions provided with increase in the frequency of infant death").

### **C. Plaintiffs Lewis and Buckingham Fail to State a Claim Under California Law**

#### **1. Requirements to State a Claim Under California Law**

##### **(a) Pleading Requirements Applicable to the UCL, FAL, and CLRA**

Statutory standing under the UCL, FAL, and CLRA does not merely require a consumer to "be exposed to an unlawful practice." Rather, the unlawful practice must "caus[e] or result[] in some sort of damage." *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009) (CLRA); *see also In re Tobacco II Cases*, 46 Cal. 4th 298, 306 (2009) (UCL). Plaintiffs only have statutory standing where they have: (1) suffered an "injury in fact"; and (2) "lost money or property as a result of the unfair competition." *See Bus. & Prof. Code §§ 17204, 17535; Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 324 (2011). The FAL's and CLRA's standing requirements generally mirror the UCL's. *Id.* at 322; *Meyer*, 45 Cal. 4th at 641 (for standing under the CLRA, "a consumer must experience some damage, some type of increased costs").

Additionally, a plaintiff cannot state fraud-based claims under the UCL, FAL, or CLRA unless she alleges facts showing that the practice would likely deceive a reasonable consumer—that is, "that a significant portion of the general consuming public or of *targeted consumers*, acting reasonably under the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal.

1 App. 4th 496, 508 (2003) (emphasis added). Thus, Plaintiffs must allege facts showing what a  
 2 reasonable consumer believes with respect to the issue. *Rubenstein v. The Gap, Inc.*, 14 Cal. App.  
 3 5th 870, 876–77 (2017); *see also Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1275  
 4 (2006) (holding that a “mere[]” conclusion that “the public would likely be deceived” is  
 5 insufficient “without pleading any facts showing the basis for that conclusion”).

6 **(b) Pleading Requirements Applicable to Common Law Fraudulent  
 7 Concealments and Negligent Misrepresentation**

8 In California, common law fraudulent concealment requires “(1) the  
 9 defendant . . . concealed or suppressed a material fact, (2) the defendant [was] under a duty to  
 10 disclose the fact to the plaintiff, (3) the defendant . . . intentionally concealed or suppressed the  
 11 fact with the intent to defraud the plaintiff, (4) the plaintiff [was] unaware of the fact and would  
 12 not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of  
 13 the concealment or suppression of the fact, the plaintiff must have sustained damage.” *Smith v.  
 14 Ramis*, 647 F. App’x. 679, 681 (9th Cir. 2016) (quoting *Prakashpalan v. Engstrom, Lipscomb &  
 15 Lack*, 223 Cal. App. 4th 1105, (2014)); *see also* CACI No. 1901.

16 The elements of a claim for negligent misrepresentation mirror those  
 17 for fraudulent misrepresentation, but do not require intent to induce reliance. *See Cadlo v. Owens-  
 18 Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004). A plaintiff must allege: “(1) a misrepresentation  
 19 of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3)  
 20 with intent to induce another’s reliance on the fact misrepresented, (4) ignorance of the truth and  
 21 justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5)  
 22 damages.” *Smith*, 647 F. App’x. at 681 (quoting *B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823,  
 23 (1997)); *see also* CACI No. 1903.

24 **2. The California Plaintiffs Cannot Base their Claims on An Alleged  
 25 Failure to Disclose**

26 Plaintiffs purport to base each of their California statutory and common law claims on  
 27 R+F’s alleged failure to adequately disclose potential side effects caused by Lash Boost. Their  
 28 CC does not set forth facts to support their claims.

1       As to the “side effects” that Plaintiffs do not claim to have experienced, Plaintiffs lack  
 2 statutory standing for the same reasons they lack Article III standing: They have no injury, and  
 3 also have not alleged causation. *See Herrington v. Johnson & Johnson Consumer Companies*, No.  
 4 C 09-1597 CW, 2010 WL 3448531 \*8 (N.D. Cal. Sept. 1, 2010) (citing *Morgan v. AT&T Wireless*  
 5 *Svcs.*, 177 Cal. App. 4th 1235, 1258 (2009)) (failure to disclose presence of carcinogens in baby  
 6 products was not material, where plaintiffs did not claim to have been injured as a result).

7       As to the irritation that Plaintiffs do claim to have experienced, Plaintiffs admit that R+F  
 8 *does* disclose this irritation risk. *See, e.g.*, CC ¶ 100, 106, 107 (emphasis added). Reasonable  
 9 consumers—especially those concerned about alleged side effects—would have reviewed these  
 10 disclosures carefully and understood that irritation may occur. *See, e.g.*, *Hill v. Roll Int'l*, 195 Cal.  
 11 App. 4th 1295, 1305 (2011) (reasonable consumers would not be deceived by product packaging  
 12 directing consumers to separate website containing allegedly omitted information); *Freeman v.*  
 13 *Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (“Freeman argues that his complaint adequately  
 14 alleges that members of the public would be deceived, since it is likely that the reader will review  
 15 the large print and ignore the qualifying language in small print. This argument is not  
 16 persuasive.”)<sup>6</sup>

17       And precisely because Plaintiffs do not claim to have read R+F’s existing disclosures, they  
 18 cannot show that additional disclosures would have mattered. Indeed, Plaintiffs have not  
 19 identified what R+F should have said that would have prevented the purported harm.

20       Plaintiffs argue that R+F’s warnings are insufficient, because advising consumers to  
 21 discontinue use if they experience irritation “does not provide consumers with the information to  
 22 make an informed decision before they experience an adverse side effect.” CC ¶ 111. This is  
 23 irrelevant, because they do not claim to have read this statement. It is also wrong, because R+F’s

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24       <sup>6</sup> *See also Porras v. StubHub, Inc.*, No. C12-12252012 WL 3835073 \*6 (N.D. Cal. Sept. 4,  
 25 2012) (same); *Davis v. HSBC Bank Nevada*, 691 F.3d 1152, 1162 (9th Cir. 2012) (“Given the  
 26 advertisement’s legible disclaimer that ‘[o]ther restrictions may apply,’ no reasonable consumer  
 27 could have believed that if an annual fee was not mentioned, it must not exist.”); *Alfi v.*  
*Nordstrom, Inc.*, No. 09cv1249 BEN, 2010 WL 5093434 \*5 (S.D. Cal. Dec. 8, 2010); *Baxter v.*  
*Intelius, Inc.*, No. SACV 09-1031, 2010 WL 3791487 \*4 (C.D. Cal. Sept. 16, 2010); *Ford v.*  
*Hotwire, Inc.*, No. 07-cv-1312, 2007 WL 6235779 \*4 (S.D. Cal. Nov. 19, 2007).

1 instructions clearly communicate that side effects may occur. Plaintiffs' allegation that someone  
 2 reading Lash Boost's warnings would "reasonably conclude that the product was safe and non-  
 3 irritating" (*Id.* ¶ 114) is not only irrelevant, but also wrong. Plaintiffs did not read the warnings,  
 4 but if they had, they would have seen warnings about irritation. And even if they read nothing at  
 5 all, most consumers would likely know that cosmetics used around the eye can cause irritation.  
 6 *See, e.g.*, <https://www.instyle.com/beauty/eyes/best-mascaras-sensitive-eyes>; <https://www.allure.com/story/mascara-for-sensitive-eyes>; [http://www.oprah.com/fashion\\_and\\_beauty/does-mascara-irritate-your-eyes-heres-why](http://www.oprah.com/fashion_and_beauty/does-mascara-irritate-your-eyes-heres-why) (all last visited October 19, 2018).

9 Plaintiffs also argue that R+F should have disclosed: (a) side effects caused by its  
 10 ingredient IC (CC ¶¶ 2, 85, 101, 105); and (b) that IC is a prostaglandin analog, so that a doctor  
 11 can provide knowledgeable advice (*id.* ¶¶ 9, 112). Plaintiffs do not explain how an ingredient-  
 12 specific warning would give customers better information than a warning about side effects of  
 13 Lash Boost itself. Further, none of the Plaintiffs claim to have discussed their use of Lash Boost  
 14 with a doctor.

15 **3. The California Plaintiffs Fail to Allege Facts Showing that R+F Acted  
 16 with Scienter**

17 Plaintiffs' FAL, fraudulent concealment, and negligent misrepresentation claims each  
 18 require allegations that R+F knew or should have known its representations were false or  
 19 misleading, or that it acted with reckless disregard for the truth. *See* CACI Nos. 1901, 1903; Cal.  
 20 Bus. & Prof. Code § 17500; *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 967, 974 n.9  
 21 (N.D. Cal. 2008). Similarly, the UCL, FAL, and CLRA require Plaintiffs to allege "facts—as  
 22 opposed to conclusory assertions—that [R+F was] aware of or had any reason to know of [these  
 23 other alleged side effects] at the time of sale." *Smith v. LG Elecs.*, No. C 13-4361 PJH, 2014 WL  
 24 989742 \*11-12 (N.D. Cal. Mar. 11, 2014) (citations omitted); *see also Rice v. Sunbeam Prods.,*  
 25 *Inc.*, No. CV12-7923, 2013 WL 146270 \*7 (C.D. Cal. Jan. 7, 2013) ("Because plaintiff's  
 26 allegations are lacking in factual support or specificity as to defendant's knowledge of the  
 27 purported defect, plaintiff's claim based on a theory of omission is insufficient."); *Kowalsky v.  
 28 Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1160–63 (N.D. Cal. 2011) (same).

1       Here, Plaintiffs have not alleged any facts showing that R+F knew of the purported falsity  
 2 of its representations. They contend that R+F “knew, or should have known, when their product  
 3 was tested by an ophthalmologist, and based on overwhelming medical and scientific research, as  
 4 well as user experience that the prostaglandin analog ingredient in Lash Boost could cause serious  
 5 adverse effects and physical injury to patients using it.” CC ¶ 136. But even the face of the CC  
 6 admits that R+F made efforts to warn consumers of irritation, and, as shown above, the CC does  
 7 not allege scientific facts demonstrating that Lash Boost causes serious side effects, or that R+F  
 8 knew of this. The “scientific research” cited by Plaintiffs concerns other products—not Lash  
 9 Boost. Furthermore, the customer complaints cited in the CC refer only to symptoms of irritation  
 10 that R+F already warns of.

11                   **4. There Are No Allegations to Support a Violation of the UCL’s**  
 12                   **“Unlawfulness” or “Unfairness” Prongs**

13       To state a cause of action based on an “unlawful” business act or practice, a plaintiff must  
 14 allege facts sufficient to show a violation of some underlying law. *See Lazar v. Hertz Corp.*, 69  
 15 Cal. App. 4th 1494, 1505 (1999); *Berryman v. Merit Property Mgmt.*, 152 Cal. App. 4th 1544,  
 16 1554–55 (2007). Plaintiffs here do not purport to base their unlawfulness claim under any other  
 17 statute. Their unlawfulness claim must therefore fail.

18       The CC also fails to allege any violation of the UCL’s “unfairness” prong, as it does not  
 19 identify any activity that “significantly threatens or harms competition” or that violates a  
 20 legislatively-declared policy. *Cel-Tech Commc’ns v. L.A. Cellular Tel.*, 20 Cal. 4th 163, 187  
 21 (1999). Similarly, when balancing R+F’s alleged conduct (lawfully advertising and selling a  
 22 product intended to improve the appearance of eyelashes) against the “gravity of the harm to the  
 23 alleged victim” (none), the balance tips strongly against Plaintiff. *State Farm Fire & Cas. v.*  
 24 *Super. Court*, 45 Cal. App. 4th 1093, 1103–04 (1996). Finally, Plaintiffs have not alleged any  
 25 conduct by R+F that “offends an established public policy or . . . is immoral, unethical,  
 26 oppressive, unscrupulous or substantially injurious to consumers.” *Scripps Clinic v. Superior*  
 27 *Court*, 108 Cal. App. 4th 917, 939 (2003).

28

**5. The California Plaintiffs Fail to Allege that They Lack an Adequate Remedy at Law, Requiring Dismissal of their UCL and FAL Claims**

3        “A plaintiff seeking equitable relief in California must establish that there is no adequate  
4 remedy at law available.” *Gomez v. Jelly Belly Candy Co.*, No. EDCV 17-00575-CJC(FFM),  
5 2017 WL 8941167 \*1–2 (C.D. Cal. Aug. 18, 2017) (citing *Philips v. Ford Motor Co.*, No. 14-CV-  
6 02989-LHK, 2015 WL 4111448\*16 (N.D. Cal. July 7, 2015)); *see also Nguyen v. Nissan N. Am.*,  
7 No. 16-CV-05591-LHK, 2017 WL 1330602 \*5 (N.D. Cal. Apr. 11, 2017) (“Plaintiff’s allegations  
8 [regarding inadequacy of damages as a legal remedy] simply demonstrate that equitable remedies  
9 exist. Plaintiff fails to explain how damages are inadequate to compensate for Plaintiff’s alleged  
10 harm.”). This requirement follows from the well-established principle that “equitable relief is not  
11 appropriate where an adequate remedy exists at law.” *Schroeder v. United States*, 569 F.3d 956,  
12 963 (9th Cir. 2009); *see also Prudential Home Mortg. v. Superior Court*, 66 Cal. App. 4th 1236,  
13 1249 (1998) (same); *Martin v. Cty. of L.A.*, 51 Cal. App. 4th 688, 696 (1996); *Morales v. Trans*  
14 *World Airlines, Inc.*, 504 U.S. 374, 381, 112 S. Ct. 2031, 2035 (1992) (“It is a ‘basic doctrine of  
15 equity jurisprudence that courts of equity should not act . . . when the moving party has an  
16 adequate remedy at law and will not suffer irreparable injury if denied equitable relief.’”).

17       Here Plaintiffs seek restitution under the FAL and UCL for the same conduct for which  
18 they seek damages under the CLRA. CC ¶ 195. They do not claim that damages would provide  
19 an inadequate remedy at law, and do not seek any other relief under the FAL or UCL. Numerous  
20 courts have dismissed claims for equitable relief under the UCL and FAL where the plaintiff is  
21 pursuing damages for the same conduct. *See, e.g., Gomez*, 2017 WL 8941167 \*1–2; *Nguyen*,  
22 2017 WL 1330602 \*5; *Bird*, 2014 WL 7248734 \*6; *Sansoe v. Ford Motor Co.*, 2017 WL 4025218  
23 \*2 (N.D. Cal. Sept. 13, 2017). Plaintiffs’ UCL and FAL claims should similarly be dismissed.

## 6. Additional Reasons the California Common Law Fraud Claims Fail

25 Plaintiffs' claims for fraudulent concealment and negligent misrepresentation fail for  
26 additional reasons:

27        **No Justifiable Reliance.** In order to state a claim under either theory, Plaintiffs must  
28        allege justifiable reliance. *See Wells Fargo Bank v. FSI Financial Solutions, Inc.*, 196 Cal. App.

1 4th 1559, 1573 (2011); *Bower v. AT & T Mobility, LLC*, 196 Cal. App. 4th 1545, 1557 (2011).  
 2 Here, Plaintiffs fail to allege any reliance—justifiable or otherwise.

3       ***No Affirmative Misrepresentation.*** Under California law, “[a] negligent misrepresentation  
 4 claim ‘requires a positive assertion,’ not merely an omission.” *Lopez v. Nissan N. Am.*, 201 Cal.  
 5 App. 4th 572, 596 (2011) (quoting *Vega v. Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282, 1  
 6 (2004)); *Regents v. Principal Fin.*, 412 F. Supp. 2d 1037, 1045 (N.D. Cal. 2006) (“California  
 7 negligent misrepresentation law, however, does not impose liability for negligent omissions”).  
 8 “An ‘implied’ assertion or representation is not enough.” *Wilson v. Century 21 Great W. Realty*,  
 9 15 Cal. App. 4th 298, 306 (1993). Plaintiffs’ negligent misrepresentation claim rests on R+F’s  
 10 alleged failure to disclose side effects, and therefore fails. *See, e.g.*, CC ¶ 214. To the extent  
 11 Plaintiffs purport to bring their negligent misrepresentation claim on a partial disclosure, this  
 12 claim fails because Plaintiffs do not claim to have viewed or relied on any such representation.

13       ***No Intent to Induce Reliance or to Deceive.*** Both fraud claims require Plaintiffs to allege  
 14 that R+F intended for Lash Boost customers to rely on its alleged misrepresentations or material  
 15 omissions. *See* CACI Nos. 1901, 1903. Fraudulent concealment requires allegations of intent to  
 16 deceive—not merely to induce reliance. *City of Atascadero v. Merrill Lynch, Pierce, Fenner &*  
 17 *Smith*, 68 Cal. App. 4th 445, 482 (1998). Plaintiffs baldly assert that R+F intended to induce  
 18 reliance and to deceive consumers, but they allege no facts to support these claims.

19       ***No Damages.*** Finally, Plaintiffs must plead the existence of an actual monetary loss.  
 20 *Alliance Mortg. v. Rothwell*, 10 Cal. 4th 1226, 1239 (Cal. 1995). Plaintiffs allege no such  
 21 damages here. They do not claim to have paid more than Lash Boost was worth, or that the  
 22 product did not perform as expected.

23       **D.       Plaintiff Huling Has Failed to State a Claim Under the Florida FDUTPA**

24        “[A] consumer claim for damages under [the Florida Deceptive and Unfair Trade  
 25 Practices Act (FDUTPA)] has three elements: (1) a deceptive act or unfair practice; (2) causation;  
 26 and (3) actual damages.” *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA  
 27 2006), *review denied*, 962 So. 2d 335 (Fla. 2007). Plaintiff Huling, the only Florida plaintiff, does  
 28 not adequately allege any of these three prongs.

1 As to damages, Huling’s only alleged injury—that she regrets making her purchase—is not  
 2 actionable under Florida law. *See, e.g., Lombardo v. Johnson & Johnson Consumer Cos.*, 124 F.  
 3 Supp. 3d 1283, 1290 (S.D. Fla. 2015) (“paying premium rates is vital to her FDUTPA claim  
 4 because *actual* loss is a predicate to recovery under FDUTPA.”); *Rollins*, 951 So. 2d at 873  
 5 (“FDUTPA does not provide for the recovery of nominal damages, speculative losses, or  
 6 compensation for subjective feelings of disappointment.”) (citations omitted); *see also* Fla. Stat. §  
 7 501.211. Huling does not allege how R+F caused any injury. The FDUTPA does not specifically  
 8 require “reliance,” but “causation is a necessary element of a claim, and ‘causation must be direct,  
 9 rather than remote or speculative.’ ” *Lombardo*, 124 F. Supp. 3d at 1290 (citation omitted); *see*  
 10 *also Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617, 644 (S.D. Fla. 2008) (“the consumer  
 11 must also plead and prove that he or she was aggrieved by the unfair and deceptive act.”)  
 12 (quoting *Macias v. HBC of Fla., Inc.*, 694 So.2d 88, 90 (Fla. 3d DCA 1997)); *Marino v. Home*  
 13 *Depot U.S.A., Inc.*, 245 F.R.D. 729 (S.D. Fla. 2007) (noting that causation was an element  
 14 of FDUTPA in an action based on defendant’s failure to disclose information).

15 To establish causation under a FDUTPA claim, “the plaintiff must prove that ‘the alleged  
 16 practice was likely to deceive a consumer acting reasonably *in the same circumstances.*’ ” *Cold*  
 17 *Stone Creamery, Inc. v. Lenora Foods I, LLC*, 332 F. App’x 565, 567 (11th Cir. 2009) (internal  
 18 citation omitted) (emphasis added). A reasonable consumer who made a purchase in the same  
 19 circumstances as Huling—without reading information or materials regarding a product—cannot  
 20 have been deceived by a defendant’s failure to include certain disclosures in those statements. *See*  
 21 *Berenguer v. Warner-Lambert Co.*, No. 02-05242, 2003 WL 24299241, at \*2 (Fla. Cir. Ct. July  
 22 31, 2003) (“[P]laintiffs must plead that they were ‘exposed to the Defendants’ advertising and  
 23 marketing materials alleged to constitute a deceptive trade practice’ and that they ‘suffered actual  
 24 damages as a result.’ ”) (citation omitted); *Justice v. Rheem Mfg.*, 318 F.R.D. 687, 697(S.D. Fla.  
 25 Apr. 27, 2016) (plaintiffs could not prove causation on a classwide basis because “many  
 26 consumers do not review central AC system product brochures or the websites of AC  
 27 manufacturers, and thus would be unlikely to be exposed to a disclosure of an alleged defect”).

28 Finally, Huling does not allege that her purchase took place within Florida, as required to

1 state an FDUTPA claim. *Amar Shakti Enters. v. Wyndham Worldwide, Inc.*, No. 10-1857, 2011  
 2 WL 3687855 \*3 (M.D. Fla. Aug. 22, 2011).

3 **E. Plaintiff Whetsell Fails to State a Claim Under the Illinois ICFA**

4 The Illinois Consumer Fraud Act (“ICFA”) proscribes deceptive and unfair practices. To  
 5 state a claim under the ICFA for deceptive practices, Plaintiff must allege: “(1) a deceptive act or  
 6 practice by the defendant; (2) the defendant’s intent that the plaintiff rely on the deception; (3) the  
 7 occurrence of the deception in the course of conduct involving trade or commerce; and (4) actual  
 8 damage to the plaintiff; (5) proximately caused by the deception.” *Avery v. State Farm Mut. Auto.*  
 9 *Ins.*, 835 N.E.2d 801, 850 (Ill. 2005). The CC lacks almost all of these elements: a deceptive act,  
 10 intent to deceive, actual damage, or causation. *See* Section IV.C, *infra*.

11 “To bring an action pursuant to the ICFA, a plaintiff must allege ‘actual damages’ and the  
 12 ‘actual damages must arise from purely economic injuries.’” *Thrasher-Lyon v. Ill. Farmers Ins.*,  
 13 861 F. Supp. 2d 898, 912 (N.D. Ill. 2012) (“Actual damages must be calculable and measured by  
 14 plaintiff’s loss.”); *Frye v. L’Oreal USA*, 583 F. Supp. 2d 954, 957 (N.D. Ill. 2008) (“Because  
 15 actual damages is an element of the claim, plaintiff must allege that she has been harmed in a  
 16 concrete, ascertainable way . . . . ‘Theoretical harm is insufficient. Damages may not be predicated  
 17 on mere speculation, hypothesis, conjecture or whim.’”); *see also* 815 ILCS 505/10a. Whetsell  
 18 claims that she bought something she would not have otherwise purchased but for R+F’s alleged  
 19 omission, but this does not qualify as actual damage. *Kim v. Carter’s Inc.*, 598 F.3d 362, 365 (7th  
 20 Cir. 2010) (the element of actual damages “requires that the plaintiff suffer actual pecuniary  
 21 loss.”); *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1196 (Ill. 2008); *Haywood v. Massage Envy*  
 22 *Fran.*, 887 F.3d 329, 333 (7th Cir. 2018); *accord Camasta v. Jos. A. Banks Clothiers, Inc.*, 761  
 23 F.3d 732, 739–40 (7th Cir. 2014) (affirming dismissal of ICFA claim because plaintiff failed to  
 24 “sufficiently plead[] that he paid more than the actual value of the merchandise he received”).

25 Whetsell also fails to allege that she saw or relied on any representation by R+F. CC ¶ 40.  
 26 Her bare allegation that “[t]he consumer fraud proximately caused Plaintiff’s injuries,” *id.* ¶ 273,  
 27 does not satisfy Rule 9(b). *See Camasta*, 761 F.3d at 737–38 (a representation must have been  
 28 made to a plaintiff before the purchase of the merchandise to be actionable under ICFA); *Oliveira*

1 *v. Amoco Oil Co.*, 776 N.E.2d 151, 155–56 (Ill. 2002). Whetsell also fails to allege facts to support  
 2 her boilerplate allegation that “Rodan + Fields intended to induce Plaintiffs’ reliance on the  
 3 deception.” CC ¶ 271.

4 Plaintiff Whetsell cannot save her ICFA claim by reframing it as one for an unfair practice.  
 5 An unfair practice must either: (1) offend public policy; or (2) be immoral, unethical, oppressive,  
 6 or unscrupulous; and it must (3) cause a substantial injury to consumers. *Robinson v. Toyota*  
 7 *Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002). A practice offends public policy if “it  
 8 violates a standard of conduct set out by an existing statute or common law doctrine that typically  
 9 governs such situations.” *W. Ry. Devices Corp. v. Lusida Rubber Prods.*, No. 06-cv-0052, 2006  
 10 WL 1697119 \*4 (N.D. Ill. June 13, 2006). The CC identifies no such standard. Similarly,  
 11 “[c]onduct is oppressive only if it imposes a lack of meaningful choice or an unreasonable burden  
 12 on its target.” *Toney v. Kinsch*, No. 10-cv-06375, 2012 WL 567729 \*7 (N.D. Ill. Feb. 21, 2012);  
 13 *see also Robinson*, 775 N.E.2d at 962. The CC does not include this allegation, either.

14 Whetsell’s claim also fails because she also does not claim that her purchase took place  
 15 within Illinois. 815 Ill. Comp. Stat. Ann. 505/10a (private right of action exists only for  
 16 transactions that take place “primarily and substantially” in Illinois); *Barbara’s Sales, Inc. v. Intel*  
 17 *Corp.*, 879 N.E.2d 910, 919 (Ill. 2007).

18 **F. Plaintiff Merle Fails to State an Claim Under Massachusetts’ Chapter 93(A)**

19 Section 93A prohibits “Unfair methods of competition and unfair or deceptive acts or  
 20 practices in the conduct of any trade or commerce,” and provides a private right of action to “Any  
 21 person . . . who has been injured” by the unfair or deceptive conduct. Mass. Gen. Laws Ann. ch.  
 22 93A, §§ 2(a), 9(a). Plaintiff Merle’s Section 93A claim fails because she does not allege any  
 23 unfair or deceptive conduct, much less causation or reliance. *See Mass. Laborers’ Health &*  
 24 *Welfare Fund v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 242–43, n.5 (D. Mass. 1999) (reliance is  
 25 “‘an essential link’ in the proof of causation”). Merle, like the other Plaintiffs, does not allege  
 26 facts showing that R+F acted deceptively or failed to disclose anything it had a duty to disclose.

27 Merle also fails to allege an actionable injury. The First Circuit has made clear that a claim  
 28 of deception or unfair practice is not, in itself, sufficient to establish a requisite injury under

1 Chapter 93A. *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 7–10 (1st Cir. 2017) (“a claim resting only  
 2 on a deceptive practice . . . is insufficient”). In *Shaulis*, the plaintiff claimed that she was  
 3 “induced” to make a purchase she would not have made but for the defendant’s alleged  
 4 misrepresentation. *Id.* at 11. The court rejected the plaintiff’s argument, finding that it “merges  
 5 the alleged deception with the injury,” and that “the subjective belief as to the nature of the value  
 6 received”—does not state a legally cognizable economic injury because it “fails to identify  
 7 anything objective that [she] bargained for that she did not, in fact, receive.” *Id.* at 11–12.

8 Like the plaintiff in *Shaulis*, Merle has not alleged anything to demonstrate that Lash Boost  
 9 failed to provide her with the benefit that she paid for. She claims to have experienced some  
 10 dryness but does not base her claim on this. CC ¶ 52. She alleges no facts to demonstrate any  
 11 difference in value between what she paid and what she received. She has therefore failed to meet  
 12 the requirement of 93A to plead facts showing an injury distinct from the alleged deception itself.

13 Merle also fails to allege unfairness, which, under Massachusetts law, is “examined under  
 14 a three part test[]: (1) whether the practice is . . . within at least the penumbra of some common-  
 15 law, statutory, or other established concept of fairness; (2) whether it is immoral, unethical,  
 16 oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors  
 17 or other businessmen).” *Rizzuto v. Joy Mfg.*, 834 F.2d 7, 8 (1st Cir. 1987). To be an “unfair”  
 18 practice under Chapter 93A, the conduct “must attain a level of rascality that would raise an  
 19 eyebrow of someone inured to the rough and tumble of the world of commerce,” *Levings v.*  
 20 *Forbes & Wallace, Inc.*, 396 N.E.2d 149 (Mass. App. Ct. 1979); “have an extortionate quality that  
 21 gives it the rancid flavor of unfairness,” *Atkinson v. Rosenthal*, 598 N.E.2d 666 (Mass. App. Ct.  
 22 1992); or fall within “some common-law, statutory or other established concept of unfairness, or  
 23 rises to the level of immoral, unethical, oppressive or unscrupulous,” *PMP Assocs. v. Globe*  
 24 *Newspaper Co.*, 321 N.E.2d 915 (Mass. 1975); *see also GMO Trust v. ICAP PLC*, No. 12-10293,  
 25 2012 WL 5197545 \*10 (D. Mass. Oct. 18, 2012) (“the defendant’s conduct must not only be  
 26 wrong, but egregiously wrong.”). Plaintiff Merle has failed to allege any facts to suggest that R+F  
 27 acted immorally or oppressively.

28

1           **G.        Hufnagel, Gattuso, and Wagner Do Not State a New York GBL Claim**

2           To state a claim under GBL §§ 349 and 350, Plaintiffs Hufnagel, Gattuso, and Wagner  
 3 must allege “first, that the challenged act or practice was consumer-oriented; second, that it was  
 4 misleading in a material way; and third, that the plaintiff suffered injury as a result of the  
 5 deceptive act.” *Frantzilas v. DirecTV, LLC*, 731 F. App’x. 71, 72 (2d Cir. 2018) (citing *Stutman v.*  
 6 *Chem. Bank*, 731 N.E.2d 608 (N.Y. App. Ct. 2000)). The New York Plaintiffs’ GBL claims fail  
 7 because they have not adequately alleged any misleading conduct. *See Oswego Laborers’ Local*  
 8 *214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744–45 (N.Y. App. Ct. 1995)  
 9 (the court may decide as a matter of law whether a reasonable consumer would be deceived by the  
 10 advertisement alleged to be at issue).

11           Plaintiffs’ GBL claims fail because Plaintiffs have not alleged any cognizable injury.  
 12 Under New York law, a plaintiff cannot allege a legally cognizable injury simply by claiming that  
 13 she would not have bought an item “but for” the alleged deception. *See Small v. Lorillard*  
 14 *Tobacco Co.*, 720 N.E.2d 892, 898 (NY App. Ct. 1999). In *Small*, the Court of Appeals upheld  
 15 dismissal of § 349/§ 350 claims for failure to plead actual injury. The plaintiffs there alleged that  
 16 the defendants’ deceptive practices prevented them from making “free and informed choices,” and  
 17 that consumers “who buy a product that they would not have purchased, absent a manufacturer’s  
 18 deceptive commercial practices, have suffered an injury.” Plaintiffs sought recoupment of the  
 19 purchase price. 720 N.E.2d at 894, 898. Rejecting this theory, the Court of Appeals held:

20           Plaintiffs’ definition of injury is legally flawed. Their theory contains no  
 21 manifestation of either pecuniary or “actual” harm; plaintiffs do not allege that the  
 22 cost of cigarettes was affected by the alleged misrepresentation, nor do they seek  
 23 recovery for injury to their health as a result of their ensuing addiction. Indeed,  
 24 they chose expressly to confine the relief sought solely to monetary recoupment of  
 25 the purchase price of the cigarettes. Plaintiffs’ cause of action . . . thus sets forth  
 26 deception as both act and injury.

27           *Id.* at 898. Under *Small*, a plaintiff must assert a harm independent of the claimed deception.  
 28 Otherwise, the complaint merely “sets forth deception as both act and injury” and fails to assert  
 any independent harm; there can be no “purchase price” injury if the plaintiff received a good with  
 a value equal to or greater than what he paid for it. *See id.* at 898–99; *see also Preira v. Bancorp*

1 *Bank*, 885 F. Supp. 2d 672, 679 (S.D.N.Y. 2012) (citing *Small*, holding “[T]he New York Court of  
 2 Appeals has expressly rejected [the argument] ‘that consumers who buy a product that they would  
 3 not have purchased, absent a manufacturer’s deceptive commercial practices, have suffered an  
 4 injury under NY General Business Law §349.’ ”). Plaintiffs’ claim that they bought Lash Boost  
 5 but now wish they hadn’t falls squarely under *Small* and must be dismissed.<sup>7</sup> *See also Belcastro v.*  
 6 *Burberry Ltd.*, No. 16-CV-1080 (VEC), 2017 WL 5991782 \*4 (S.D.N.Y. Dec. 1, 2017).

7 Plaintiffs’ claim that they suffered injury in the form of “lost money from purchasing Lash  
 8 Boost that was unlawfully advertised and marketed in violation of pursuant to N.Y. Gen. Bus. Law  
 9 §§ 349 and 350,” CC ¶335, fares no better. Plaintiffs do not allege what law R+F allegedly  
 10 violated, or any facts to support this claim for unlawfulness.

11 Plaintiffs’ GBL claim also require causations—that is, that Plaintiffs suffered injury as a  
 12 result of R+F’s alleged deceptive conduct. *Gale v. Int’l Bus. Machines Corp.*, 781 N.Y.S.2d 45,  
 13 47 (2nd Dep’t 2004) (affirming dismissal because “[i]f the plaintiff did not see any of these  
 14 statements, they could not have been [the] cause of his injury, there being no connection between  
 15 [the] deceptive act and [the] plaintiff’s injury”). As discussed above, Plaintiffs do not tie R+F’s  
 16 allegedly deceptive conduct to an injury they personally incurred. *See id; Karakus v. Wells Fargo*  
 17 *Bank, N.A.*, 941 F. Supp. 2d 318, 341 (E.D.N.Y. 2013) (finding no “link” between alleged error in  
 18 disclosure statement and purported injuries, and one plaintiff “did not even read” the statement).

19 Plaintiffs’ GBL claims also fail because Plaintiffs do not claim to have made their  
 20 purchases within New York. *See Goshen v. Mutual Life Insurance Company of New York*, 774  
 21 N.E.2d 1190, 1196 (N.Y. App. Ct. 2002) (§ 349 “was not intended to police the out-of- state  
 22 transactions of New York companies”).

23 **H. Plaintiff Williams Fails to State a Claim Under the Washington CPA**

24 To prevail on her CPA claim, Plaintiff Williams must show: (1) an unfair or deceptive act  
 25 or practice; (2) that act or practice occurs in trade or commerce; (3) a public interest impact; (4) an

26 <sup>7</sup> To the extent Plaintiffs claim they would have still bought Lash Boost, but would have paid  
 27 less for it, this claim also fails. *See DaCorta v. AM Retail Grp.*, No. 16-CV-01748 (NSR), 2018  
 28 WL 557909 \*9 (S.D.N.Y. Jan. 23, 2018); *Brandt v. CremaLita Mgmt.*, No. 600566/04, 2006 N.Y.  
 Misc. LEXIS 4101 \*17, n.4 (Sup. Ct. N.Y. Cty. June 9, 2006).

1 injury to business or property; and (5) a causal link between the unfair or deceptive act and the  
 2 injury. *Jackson v. Esurance Ins.*, 412 P.3d 299, 304 (Wash. App. Div. 2017) (citing *Hangman*  
 3 *Ridge Training Stables, Inc. v. Safeco Title Ins.*, 105 Wash.2d 778, 784–85, 719 P.2d 531 (1986)).  
 4 Washington courts have held that a deceptive act must have the capacity to deceive a substantial  
 5 portion of the population (*Sing v. John L. Scott, Inc.*, 948 P.2d 816, 820 (Wash. Sup. Ct. 1997))  
 6 and “misleads or misrepresents something of material importance.” *Holiday Resort Cmtv. v. Echo*  
 7 *Lake Assocs.*, 135 P.3d 499, 507 (Wash. Sup. Ct. 2006).

8 Williams has pointed to no misleading or untrue statement made to her by R+F. Williams  
 9 also fails to allege any plausible factual basis—let alone particularized facts—to establish  
 10 causation or injury. *See, e.g., Maple v. Costco Wholesale Corp.*, 649 F. App’x. 570, 572–73 (9th  
 11 Cir. 2016) (affirming dismissal of CPA claim, without leave to amend, for lack of causation and  
 12 remanding with instructions to re-enter judgment as “with prejudice”); *Stafford v. Sunset Mortg.*,  
 13 No. C12-1877, 2013 WL 1855743 \*3 (W.D. Wash. Apr. 29, 2013) (“even if Plaintiff could  
 14 prove . . . a deceptive act or unfair business practice, her CPA claim still fails because she does not  
 15 allege specific facts regarding causation”); *see also* RCW 19.86.090. Plaintiff’s claim also fails  
 16 because she does not identify the consultant who allegedly sold her Lash Boost. CC ¶ 67.

17 To the extent Williams purports to bring an unlawfulness claim based on her formulaic  
 18 recitation that R+F “engaged in deceptive and unlawful acts,” (CC ¶ 352), her claim fails because  
 19 Plaintiff does not identify any predicate statute that R+F violated.

20 **I. The Out-of-State Plaintiffs’ Common Law Claims Also Fail**

21 **1. Fraudulent Misrepresentation and Concealment Fraudulent**

22 Plaintiffs purport to bring fraudulent misrepresentation claims under Florida and  
 23 Massachusetts law, based on omission and partial misrepresentation theories; fraudulent  
 24 concealment claims under New York and Washington law; and a claim for “Fraudulent  
 25 Concealment/Misrepresentation” under Illinois law. Plaintiffs do not allege facts to state a claim  
 26 under any of these laws.

27 Fraudulent misrepresentation under Florida, Illinois, or Massachusetts law requires: (1) a  
 28 false statement concerning a material fact; (2) the representor’s knowledge that the representation

1 is false; (3) an intention that the representation induce another to act; and (4) an injury to the party  
 2 acting in reliance. *Arlington Pebble Creek, LLC v. Campus Edge Condo. Assn.*, 232 So. 3d 502,  
 3 505 (Fla. 1st Dist. App. 2017), *reh'g denied* (Jan. 9, 2018), *review denied*, SC18-237, 2018 WL  
 4 3301498 (Fla. July 5, 2018); *Doe v. Dilling*, 888 N.E.2d 24, 29 (Ill. 2008) (citations omitted); *Rodi*  
 5 v. S. New Eng. Sch. of L.

6 , 532 F.3d 11, 15 (1st Cir. 2008) (citations omitted). “To constitute fraud,  
 7 a misrepresentation must be of a specific material fact that is untrue and known to be so.”  
 8 *Huffstetler v. Our Home Life Ins.*, 65 So. 1 (Fla. 1914). Illinois and Massachusetts law each also  
 9 require justifiable reliance. *Doe v. Dilling*, 888 N.E.2d at 29; *Robert E. Ricciardelli Carpet Serv.*  
*v. Home Depot U.S.A.*, 679 F. Supp. 2d 192, 210 (D. Mass. 2009).

10 Fraudulent concealment under Illinois, New York, and Washington law requires falsity,  
 11 knowledge, intent to deceive, actual and justifiable reliance, and resulting damage. *See, e.g.*,  
 12 *Garner v. Johnson & Johnson, Janssen Research and Dev.*, No. 1:16-CV-01494, 2017 WL  
 13 6945335 \*5 (C.D. Ill. Sept. 6, 2017); *Bannister v. Agard*, 5 N.Y.S.D.3d 114, 115 (2d Dep’t 2015);  
 14 *Carlile v. Harbour Homes, Inc.*, 194 P.3d 280, 285 (Wash. App. Ct. 2008); *see also Eternity Glob.*  
 15 *Master Fund Ltd. v. Morgan Guar. Tr. Co.*, 375 F.3d 168, 186 (2d Cir. 2004) (plaintiff must allege  
 16 “particularized facts to support the inference that the defendants acted recklessly or with  
 17 fraudulent intent.”).

18 The out-of-state Plaintiffs have failed to state claims under their states’ common laws.  
 19 Plaintiffs have not alleged any deceptive conduct, justifiable reliance, or resulting harm. *See, e.g.*  
 20 *Wessa v. Watermark Paddlesports, Inc.*, No. C06-5156 FDB, 2006 WL 1418906 \*3 (W.D. Wash.  
 21 May 22, 2006) (“To the extent the Plaintiffs allege an omission . . . Rule 9(b) mandates the  
 22 pleading set forth the type of facts omitted and the way in which the facts made the representations  
 23 misleading”) (citing *Fujisawa Pharmaceutical Co. v. Kapoor*, 14 F. Supp. 720, 727 (N.D. Ill.  
 24 1993)). Plaintiffs do not allege particularized facts to support their claim that R+F intended to  
 25 defraud consumers. *See, e.g.*, *Kalnit v. Eichler*, 264 F.3d 131, 139–40 (2d Cir. 2001) (allegations  
 26 “that defendants were motivated to conceal” by “lucrative compensation provisions in the  
 27 Comcast agreement are too generalized to support scienter adequately”).

28

## 2. Negligent Misrepresentation

2 Plaintiffs also attempt to bring negligent misrepresentation claims under Florida, Illinois,  
3 Massachusetts, and Washington law. These states have adopted the Restatement (Second) of  
4 Torts, which provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

9 Restatement (Second) of Torts § 552(1).<sup>8</sup> With respect to each of their misrepresentation claims,  
10 Plaintiffs fail to allege an actionable misrepresentation, falsity, actual reliance, or pecuniary loss  
11 —the absence of any of which independently suffices for dismissal. *See also Rogers v. Cisco Sys.*,  
12 268 F. Supp. 2d 1305, 1314 (N.D. Fla. 2003) (allegations that plaintiffs would have acted  
13 differently had they known the truth are not sufficient to allege reliance to state a fraud or  
14 negligent misrepresentation claim).

15 Plaintiff Williams' negligent misrepresentation claim under Washington law fails because  
16 “[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must  
17 justifiably rely on a misrepresentation.” *Ross v. Kirner*, 172 P.3d 701, 704 (Wash. 2007); *see also*  
18 *Trimble v. Washington State Univ.*, 993 P.2d 259, 264 (Wash. 2000) (holding that failing to  
19 discuss the downsides of an offer of employment did not create the false impression necessary to  
20 state a claim for negligent misrepresentation). Similarly, under Florida law, a claim for negligent  
21 misrepresentation requires a misrepresentation, so Plaintiff Huling’s claim necessarily fails. *Don*  
22 *Slack Ins. v. Fidelity & Cas.*, 385 So. 2d 1061, 1063–64 (Fla. Dist. Ct. App. 1980) (“Essential  
23 elements of the tort of misrepresentation are the making of a false statement by the tortfeasor and  
24 reasonable reliance thereon by the injured party”; claim dismissed where “no communications or  
25 representations were made”); *Kahama VI, LLC v. HJH, LLC*, No. 11-cv-2029, 2013 WL 6511731

<sup>8</sup> See also, e.g., *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 339 (Fla. 1997); *Hollywood Trucking, Inc. v. Watters*, 895 N.E.2d 3, 13 (Ill. App. Ct. 2008); *Cumis Ins. Soc'y v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 47 (Mass. 2009); *Austin v. Ettl*, 286 P.3d 85, 88–89 (Wash. App. Ct. 2012) (quoting *Ross v. Kirner*, 172 P.3d 701 (2007)).

1 \*6 (M.D. Fla. Dec. 12, 2013).

2 The economic loss doctrine bars Plaintiffs' Illinois and Washington claims, limiting  
 3 Plaintiffs to contract remedies when a loss potentially implicates both tort and contract relief.  
 4 *Alejandro v. Bull*, 159 Wash. 2d 674, 680 (2007) (dismissing negligent misrepresentation claim  
 5 based on alleged misrepresentations about septic system); *First Midwest Bank v. Stewart Title  
 6 Guar*, 843 N.E.2d 327, 334 (Ill. 2006). Here, Plaintiffs' claims arise from the purchase of goods,  
 7 and Plaintiffs allege purely economic loss associated with the goods.

8 The Florida and Illinois negligent misrepresentation claims additionally fail because the  
 9 CC does not adequately allege that R+F intended to induce reliance. *Nianni, LLC v. Fox*, No. 11-  
 10 cv-118, 2011 WL 5357820 (M.D. Fla. Nov. 7, 2011); *Fox Associates, Inc. v. Robert Half Int'l*,  
 11 777 N.E.2d 603, 606 (Ill. App. Ct. 2002).

12 **J. Plaintiffs' RICO Claim Must Fail**

13 **1. Plaintiffs Lack Statutory Standing to Assert a RICO Claim**

14 **(a) Injury to Business or Property**

15 All Plaintiffs have joined in Count Twenty, which purports to state a RICO claim. To have  
 16 RICO standing, Plaintiffs must allege a concrete injury to "business or property" proximately  
 17 caused by the RICO violation. 18 U.S.C. § 1964(c). This means "a harm to a specific business or  
 18 property interest," *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005), which caused a "concrete  
 19 financial loss," *Canyon County v. Syngenia Seeds*, 519 F.3d 969, 975 (9th Cir. 2008). RICO's  
 20 statutory standing requirements preclude claims based on speculative injury. For example, the  
 21 Third Circuit found that alleged overpayment for a health plan that lacked certain features the  
 22 plaintiffs expected was not sufficiently tangible to sustain a claim under RICO. *Mato v. Aetna*,  
 23 221 F.3d 472, 488 (3d Cir. 2000); *see also In re Bridgestone/Firestone Tires Products Liability  
 24 Litigation*, 155 F. Supp. 2d 1069, 1077 (S.D. Ind. 2001).

25 Here, Plaintiffs generically allege an "economic harm" in the form of being "deprived of  
 26 money," but as shown above, really base their claim on disappointed expectations. Plaintiffs do  
 27 not specify whether their economic harm consists of the full amount they spent on Lash Boost, or  
 28 merely that they paid too much for it. In either event, they have not pled facts to support the

1 existence of harm.

2 If Plaintiffs' injury consists of the full amount they paid for Lash Boost, their allegations  
 3 are not plausible. They do not allege that the product failed to make their eyelashes look longer or  
 4 fuller. Another court in this district recently rejected a "full price" theory for reasons equally  
 5 applicable to this case. *See In re Chysler-Dodge-Jeep Ecodiesel Marketing, Sales, and Product*  
 6 *Liability Litigation* ("Ecodiesel"), 295 F. Supp. 3d (N.D. Cal. 2018). That case involved the  
 7 installation of "defeat devices" that altered the vehicles' performance so they could pass emissions  
 8 tests. *Id.* at 942–44. The court found plaintiffs' "total price" theory implausible: "Even if  
 9 Plaintiffs theoretically could not have purchased and leased the Class Vehicles 'but for' the  
 10 fraud . . . , Plaintiffs did purchase and lease the vehicles, and their use of the vehicles must be  
 11 considered." *Id.* at 958 (citing *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, &*  
 12 *Prods. Liab. Litig.*, No. 3:16-cv-1534 2016 WL 6824450 \*17 (N.D. Cal. Oct. 25. 2016) ("Class  
 13 Members could only be entitled to a full refund of the purchase price if they returned their vehicles  
 14 in the same condition they received it. Such a scenario is virtually inconceivable as it is highly  
 15 unlikely Class Members never used their vehicles after purchasing them."); *Kruse v. Chevrolet*  
 16 *Motor*, No. CIV. A. 96-1474 1997 WL 408039 \*2 (E.D. Pa. July 17, 1997).

17 As for a potential price premium, the Ninth Circuit has recognized that overpayment may  
 18 constitute an injury to "business or property", *Canyon*, 519 F.3d at 976, but courts have also  
 19 carefully distinguished actual injuries from expectation injuries, which do not confer standing. In  
 20 *McLaughlin v. American Tobacco*, 522 F.3d 215 (2d. Cir. 2008) *abrogated on other grounds by*  
 21 *Bridge v. Phoenix Bond & Indemnity*, 553 U.S. 639 (2008), a group of smokers alleged an implicit  
 22 misrepresentation that "light" cigarettes were healthier than regular cigarettes led them to overpay  
 23 for light cigarettes. *Id.* at 220. The Second Circuit rejected this theory of injury on the ground  
 24 that it was based on what plaintiffs expected to receive, not any injury to "business or property."  
 25 *Id.* at 228. Similarly, in *In re General Motors Ignition Switch Litigation*, 2016 WL 3920353  
 26 (S.D.N.Y. July 15, 2016), plaintiffs alleged they were injured when they purchased a car that  
 27 contained a latent defect, and had they had known about the defect, they would have paid less for  
 28 the car or not bought the car at all. The court rejected this "benefit-of-the-bargain" theory because

it rested on disappointed expectations, not a deprivation of actual business or property. *Id.* \*17.

2 The plaintiffs in *Ecodiesel*, in contrast to Plaintiffs here, specifically alleged that they paid  
3 a premium of “between \$3,120 and \$5,000 more for the EcoDiesel option than for the comparable  
4 gasoline vehicles.” *Id.* They also alleged the cars did not actually perform as Ecodiesels, meaning  
5 that plaintiffs may very well have “paid more than fair market value for the Class Vehicles.” *Id.*  
6 To the extent Plaintiffs assert an overpayment theory, their allegations track those rejected in  
7 *McLaughlin* and *General Motors*, and not the concrete economic harm alleged *Ecodiesel*.  
8 Plaintiffs have not alleged that they overpaid in any specific amount for Lash Boost, only that they  
9 were “wrongfully deprived of money” because “they did not receive what they paid for when  
10 purchasing Lash Boost.” CC ¶ 430. This bare allegation does not establish standing under RICO.

**(b) No Proximate Causation**

12 Plaintiffs also lack RICO standing because they have not pled facts to show that a RICO  
13 predicate offense deprived them of money or property. A civil RICO plaintiff must “show that a  
14 RICO predicate offense ‘not only was a but-for cause of his injury, but was the proximate cause as  
15 well.’” *Hemi Grp. v. City of N.Y.*, 559 U.S. 1, 9 (2010) (quoting *Holmes v. Secs. Investor*  
16 *Protection Corp.*, 503 U.S. 258, 268 (1992)). In analyzing proximate cause under RICO, the  
17 “central question” is “whether the alleged violation led directly to the plaintiff’s injuries.” *Anza v.*  
18 *Ideal Steel Supply*, 547 U.S. 451, 461 (2006).

19        “In cases where the RICO claim involves misrepresentations, such as in mail and wire  
20 fraud cases, courts often determine whether proximate cause exists by asking whether there was  
21 actual reliance on those misrepresentations.” *In re Bextra & Celebrex Marketing Sales Practices*  
22 & *Prod. Liab. Litig.*, MDL No. 1699, 2012 WL 3154957 \*4 (N.D. Cal. Aug. 2, 2012). Although  
23 reliance is not an explicit element of a RICO claim, some form of reliance must usually be shown.  
24 *Bridge*, 553 U.S. 639, 657–58 (2008) (although actual reliance need not be pleaded, “[n]one of  
25 this is to say that a RICO plaintiff who alleges injury ‘by reason of’ a pattern of mail fraud can  
26 prevail without showing that someone relied on the defendant’s misrepresentations.”); *see also*  
27 *Actimmune Marketing Litig.*, 614 F. Supp. 2d 1037, 1052 (N.D. Cal. 2009) (in RICO case  
28 involving drug marketing, plaintiffs lacked standing where the complaint did “not put forth any

1 specific allegations that anyone—the doctors, the plaintiffs themselves, or any other third party—  
 2 relied on defendants’ purportedly fraudulent misrepresentations to cause the injury”); *Bextra*, 2012  
 3 WL 3154957 \*6–7 (plaintiffs lacked standing to assert aRICO claim despite alleging it was  
 4 “foreseeable” the fraudulent marketing of a drug would induce doctors to prescribe it as there were  
 5 no “*specific* allegations that individual physicians actually relied on these misrepresentations”).

6 Here, Plaintiffs have not pled reliance on any affirmative representation. CC ¶ 121.  
 7 Indeed, the only statements allegedly received by any Plaintiff are: (1) the Lash Boost Plaintiff  
 8 Buckingham received in the mail in May 2017; and (2) the email she received confirming the  
 9 shipment of that tube. CC ¶¶ 417, 419. The CC does not even allege that Ms. Buckingham read  
 10 these statements, much less that she relied on them. And as both are communications that occurred  
 11 *after* Ms. Buckingham purchased Lash Boost, they cannot be the cause of her decision to do so.

12 To the extent Plaintiffs predicate their RICO claim on omissions, Plaintiffs have failed to  
 13 show causation for the very same reasons discussed throughout this brief. The CC is silent on  
 14 what omissions Plaintiffs relied on or that, in some other fashion, caused their alleged injuries.  
 15 Indeed, the RICO allegations do not specifically describe any omissions at all, much less how  
 16 those omissions proximately deprived Plaintiffs’ of money or property. Plaintiffs also do not  
 17 allege how R+F’s consultants—the other participants in the alleged RICO enterprise—caused  
 18 Plaintiffs’ injuries. They cite a January 2018 document described as “Distributed information re  
 19 consultants’ compensation plan on the internet,” CC ¶ 419, but do not allege that any Plaintiff read  
 20 this document, or that it says anything about Lash Boost.

21 **2. Plaintiffs Fail to Allege a Racketeering Enterprise**

22 In addition to failing to plead a basis for standing, Plaintiffs have also failed to allege facts  
 23 stating a claim under RICO. A claim under 18 U.S.C. §1962(c) requires a plaintiff to allege that  
 24 the defendant participated, directly or indirectly, in: (1) the conduct; (2) of an enterprise that  
 25 affects interstate commerce; (3) through a pattern; (4) of racketeering activity. *Eclectic Properties*  
 26 *East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014).

27 Plaintiffs have failed to plead facts to show that R+F and its consultants jointly operated a  
 28 criminal enterprise with a common purpose. To plead the existence of a criminal enterprise,

1 Plaintiffs must allege facts plausibly showing that two or more individuals had “a common  
 2 purpose of engaging in a course of conduct.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 552–53  
 3 (9th Cir. 2007). This common purpose must be criminal in nature. Courts have routinely  
 4 dismissed RICO claims where the defendants merely organized the enterprise to engage in routine  
 5 commercial activity. For example, in *Shaw v. Nissan*, 220 F. Supp. 3d 1046 (C.D. Cal. 2016), the  
 6 plaintiffs asserted that certain Nissan entities and a parts supplier engaged in a RICO enterprise to  
 7 sell Nissan cars with defective timing chains. The court found the allegations inadequate because  
 8 the only common purpose plausibly pled was to sell vehicles—not to do anything illegal. *Id.* at  
 9 1057; *see also Gomez v. Guthy-Renker*, Case No. EDCV 14-01425 2015 WL 4270042 \*11 (C.D.  
 10 Cal. July 13, 2015) (“RICO liability must be predicated on a relationship more substantial than a  
 11 routine contract between a service provider and its client”)

12 Here, Plaintiffs here have not alleged the existence of any relationship between R+F and its  
 13 consultants beyond a routine contractual arrangement under which the parties sell a variety of R+F  
 14 products. Plaintiffs repeatedly affirm that R+F’s consultants are innocent of fraudulent intent. CC  
 15 ¶¶ 387, 393, 395. By definition, the relationship R+F has with its consultants is an ordinary  
 16 commercial one, insufficient to constitute a criminal enterprise. *See, e.g., In re Countrywide Fin.*  
 17 *Mortg.-Backed Sec. Litig.*, No. 2:11-CV-07166-MRP, 2012 WL 10731957 \*8 (C.D. Cal. June 29,  
 18 2012) (“Every securities issue has an underwriter; if a claim of underwriter complicity were  
 19 sufficient, then every securities claim could be recast as a RICO claim.”); *Jubilerer v. MasterCard*  
 20 *Int’l*, 68 F. Supp. 2d 1049, 1053 (W.D. Wisc. 1999) (“Accepting plaintiff’s allegations as  
 21 sufficient to allege a RICO enterprise would lead to the absurd conclusion that each of the many  
 22 million combinations of merchant, MasterCard, and lender is a RICO enterprise.”).

23 **3. Plaintiffs Fail to Allege the Requisite Predicate Acts**

24 Plaintiffs have also failed to allege facts plausibly demonstrating that R+F and its  
 25 consultants engaged in mail or wire fraud, the alleged predicate acts that constitute “racketeering  
 26 activity.” *See* 18 U.S.C. § 1961. The elements of mail and wire fraud are “(A) the formation of a  
 27 scheme to defraud, (B) the use of the mails or wires in furtherance of that scheme, and (C) the  
 28 specific intent to defraud.” *Eclectic Properties*, 751 F.3d at 997.

**(a) No Scheme to Defraud**

2 Plaintiffs claim that R+F formed a scheme to defraud consumers by omitting that Lash  
3 Boost can cause side effects and by denying that Lash Boost affects the structure or function of  
4 eyelashes, in numerous online advertisements and mailings. CC ¶¶ 402, 405. As noted above,  
5 however, Plaintiffs do not claim to have relied on any of specific statements or alleged omissions.  
6 Plaintiffs' generic false advertising allegations fail to state a claim.

7 Courts have rejected similar efforts to convert false advertising claims into mail or wire  
8 fraud claims actionable in RICO. In *In re Countrywide Financial Mortgage Marketing and Sales*  
9 *Practices Litigation*, 601 F. Supp. 2d 1201 (S.D. Cal. 2009), the plaintiffs attempted to assert a  
10 RICO class action against Countrywide for misrepresenting the nature of its mortgage products.  
11 The plaintiffs alleged that mortgage brokers misrepresented that loan payments would not  
12 increase. The court found these allegations insufficient because they did not specify the time  
13 period during which the misrepresentation occurred. *Id.* at 1215–17. The plaintiffs also alleged  
14 that Countrywide systematically failed to disclose that it was engaged in a fraudulent scheme to  
15 sell adjustable-rate mortgages to subprime lenders. This did not suffice either, because “[a]bsent  
16 an independent duty, such as a fiduciary duty or an explicit statutory duty, failure to disclose  
17 cannot be the basis of a fraudulent scheme.” *Id.* (citing *California Architectural Building Products*  
18 *Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir. 1987)).

19       Here, Plaintiffs have identified two specific misrepresentations as underlying their RICO  
20 claim. With respect to the mailing of the Lash Boost product, the CC does not identify the date  
21 when it occurred, what it said, or why it was false. With respect to the online communication, the  
22 CC identifies only one communication made directly to a Plaintiff—an email described as  
23 “correspondence re product order and shipment status of Lash Boost.” CC ¶ 419. Again,  
24 Plaintiffs have not explained how this communication was false. Moreover, Akemi Buckingham  
25 did not receive either the mailing or the email until communications until after she purchased Lash  
26 Boost, and they therefore could not have defrauded her.

27 The remainder of Plaintiffs' allegations all trade on the nondisclosure theory discussed  
28 above. This theory fails because Plaintiffs have not pled facts to show that Lash Boost causes

1 serious side effects; that they read or relied on the warnings that R+F did provide; or that Plaintiffs  
2 would have seen the additional warnings that they claim R+F should have provided.

**(b) No Intent to Defraud**

4 Plaintiffs also fail to allege facts plausibly supporting an inference that R+F had intent to  
5 defraud, and they have not set forth facts showing that R+F knew of the alleged falsity of its  
6 statements or omissions. In the RICO context, intent to defraud may be inferred by examining the  
7 scheme itself. Because the transactions at issue here—sales of cosmetic products—are facially  
8 legitimate, greater specificity is required to demonstrate that conduct is part of a fraudulent  
9 scheme. *See Eclectic Properties*, 751 F.3d at 997–98 (when companies engage in “transactions  
10 that are facially legitimate” or “otherwise act as routine participants in American commerce, a  
11 significant level of factual specificity is required” to plausibly plead a fraudulent scheme).

12 Yet the CC establishes only that R+F engages in the perfectly ordinary activities of  
13 advertising and selling of cosmetic products. This is not a case like *Ecodiesel*, where the  
14 defendants employed a purpose-built device to cheat emissions standards. Plaintiffs' allegation  
15 that R+F "committed racketeering acts . . . intentionally and knowingly with the specific intent to  
16 advance the illegal scheme," CC ¶ 412, falls far short of the Ninth Circuit's requirement of "a  
17 significant level of factual specificity." *Eclectic Properties*, 751 F.3d at 998.

18 | VI. CONCLUSION

19 For the reasons stated herein, the Motion to Dismiss should be granted.

20 | DATED: October 26, 2018

## STEPTOE & JOHNSON LLP

By: /s/ *Stephanie Sheridan*  
STEPHANIE A. SHERIDAN  
Attorneys for Defendant  
RODAN + FIELDS, LLC